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No. _____

In The
Supreme Court of the United States

STATE OF OHIO.
Petitioner,
v.
BRIAN K. SILER,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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January, 2008

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ISSUES PRESENTED FOR REVIEW

1. Whether the state of mind of the declarant is relevant to whether a statement in response to an officer's question is "testimonial" or whether the sole determining factor is the purpose of the police officer.

2. Whether the Ohio Supreme Court erred in holding that statements of children made in response to questions by police officers are testimonial, regardless of the age, purpose, or understanding of the child, if the purpose of the police officer is investigatory.

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No.

IN THE SUPREME COURT OF THE
UNITED STATES

STATE OF OHIO

Petitioner

v.

BRIAN K. SILER

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Ohio, respectfully prays this Court to issue a Writ of Certiorari to review the judgment of the

Ohio Supreme Court in ***State v. Siler***, 116 Ohio St. 3d 39, 2007-Ohio-5637, issued on October 25, 2007.

OPINIONS BELOW

On December 6, 2004, this Court remanded the instant case to the Fifth District Court of Appeals for reconsideration in light of ***Crawford v. Washington*** 541 U.S. 36, (2004). The appellate court, in ***State v. Siler***, 164 Ohio App.3d 680, 2005-Ohio-6591, on December 13, 2005, reversed the conviction and ordered a new trial. (Appendix B) The appellate court granted the State of Ohio a stay to pursue an appeal to the Ohio Supreme Court.

The State appealed and the Ohio Supreme Court accepted jurisdiction. On

October 25, 2007, the Ohio Supreme Court in ***State v. Siler*** 116 Ohio St. 2d 39, 2007-Ohio-5637, affirmed the appellate court. (Appendix A.)

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a). On October 25, 2007, the Ohio Supreme Court affirmed the lower court's reversing Respondent's conviction. Petitioner, State of Ohio, now timely files this Petition for Writ of Certiorari.

CONSTITUTUIONAL PROVISIONS AT ISSUE

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***(Appendix C).

STATEMENT OF THE CASE

By 6:00 a.m. on September 20, 2001, thirty-nine year old Barbara Siler's lifeless body was hanging in her garage, her toes touching the floor, her body held upright by a yellow rope wrapped around the garage door track at one end and Ms. Siler's neck at the other. She died between 4:00 a.m. and 6:00 a.m., not from hanging but from "asphyxia from strangulation as a consequence of cervical compression.".

Mrs. Siler and her husband, Respondent, Brian Siler, had for many months suffered marital problems. In June or

July, his face distorted with rage, Respondent often told two male friends that he wanted to hurt his wife as much as she had hurt him. Mrs. Siler called 911 at least three times because Respondent tried to choke her. All efforts at reconciliation having failed, Mrs. Siler demanded a divorce. Respondent refused to accept the idea of a divorce. He began stalking his wife and keeping a log of her movements. Only after Ms. Siler obtained a protective order did Brian Siler leave their home. He moved five or six miles away, into the home of his brother, Kevin Siler, and Kevin's wife, also named Barbara. Mrs. Brian Siler changed the locks on the doors.

On the evening of September 19, 2001, Brian and Kevin Siler were at Kevin's home and Kevin Siler's wife was at work. Kevin Siler went to bed between midnight and 12:30.

Used to his wife's arriving home from work between midnight and 2:00 a.m., he slept through the night. Mrs. Kevin Siler arrived home at 1:30 a.m. on September 20, 2001. She began working on her home computer. At about 3:00 a.m., Brian Siler emerged from his room, used the bathroom, and got a drink of water from the kitchen. He stopped at the door to the office and spoke to his sister-in-law, then went back into his room and closed the door. Mrs. Siler went to bed at about 4:00 a.m. About fifteen minutes after she went to bed, she heard "some banging around.***a clunking," from Respondent's bedroom, which shared a wall with the master bedroom. The sounds stopped and she went to sleep. Respondent's room had a window with a removable screen.

When Mrs. Brian Siler failed to appear for work, law enforcement officers went to her house. Deputy Ron Singleton was the first officer to arrive, at 1:54 p.m. He found Barbara Siler's body. The door from the outside into the garage had been forced open. Inside the garage was Mrs. Siler's van, the driver's door open. Deputy Singleton found Nathan asleep in his bed, wearing pajamas but uncovered. Singleton found it very difficult to awaken Nathan. When Nathan saw Singleton, he looked a little startled but said nothing. Asked if his Daddy had been there today, Nathan said "no." As Detective Singleton carried Nathan through the garage, shielding his view of his mother's body, Nathan pointed back to the garage and said, "Find Mommy." Deputy Singleton delivered Nathan to his grandfather.

Detective Larry Martin arrived on the scene at about 2:00 p.m. Detective Martin first spoke to Nathan as Nathan sat on his grandfather's lap. Their conversation was often interrupted, as Nathan frequently jumped up and ran around the yard. Preoccupied with his mother, Nathan kept trying to go back into the garage. When Detective Martin asked if anything had scared Nathan, Nathan responded, "Daddy." Asked how, Nathan said, "loud knocking." Asked what he meant, Nathan left his grandfather's lap and banged his palm on the front door. Detective Martin asked if anything else scared him. Nathan said, "Daddy and Mommy fighting." Asked where, he said they were fighting in the garage. Detective Martin sent Nathan to lunch with a family friend. After lunch, Martin asked Nathan if anyone was hurting Mommy. "Daddy did," Nathan said.

Using a children's services investigator, Jenny Taylor, to demonstrate, Martin stood behind Taylor and put his arms around her. Nathan said, "up." When Martin raised his hands to Taylor's throat, Nathan said, "yes," and began crying. Later, Nathan said that Daddy put a yellow rope around Mommy's neck.

Testing for DNA of the knot around Mrs. Siler's neck and the knot around the garage door track showed that Mrs. Siler could not be excluded as a source for the DNA from the knot around her neck but could be excluded as a DNA source from the knot around the garage door track; and that Respondent could be included as a source for the DNA at both knots.

Martin and Singleton took Respondent from his brother's house to the sheriff's

department. Respondent had fresh injuries on his hands between his thumb and fingers, and between his ring finger and index finger. He also had fresh scrapes on his knuckles and scratches on his chest, just below his neck. Eventually, the officers left Respondent alone in an interview room, which was equipped with a hidden camera, in the homicide unit. Detective Singleton watched on video. Respondent lay down. To enter the homicide unit, officers must use a key card. The card causes beeps and clicks. When Respondent heard the beeps and clicks, he arose from the couch, sat at the table, put his head in his hands, and started sobbing, just as the officers entered the room.

Based on evidence of long-standing, violent marital discord; DNA evidence; Respondent's statements to friends; and excited utterances of the couple's three-year-old son, Nathan Siler, a jury convicted Respondent of aggravated murder and death penalty specifications. Although the jury recommended the death penalty, the court sentenced Respondent to life in prison without parole.

REASONS TO GRANT THE WRIT

This court should grant certiorari because the Ohio Supreme Court erred in ruling that the "objective witness" test of ***Crawford v. Washington*** 541 U.S. 36, 124 S. Ct. 2266 (2004) and the "primary purpose" test of ***Davis v. Washington*** 547 U.S. 813, 126 S. Ct. 2266 (2006) are mutually exclusive. The Ohio Supreme Court decided that the "objective witness" test is irrelevant to statements made by a child of any age responding to a police officer's questions. The Ohio Supreme Court decided that whether statements of children answering questions of police officers are "testimonial" depends solely on the purpose of the police officers. That test is inconsistent with this

Court's opinion in ***Davis v. Washington***, and fails to serve the purpose of the Confrontation Clause of the Constitution of the United States of America.

The Ohio Supreme Court erred in holding that the "objective witness" test is inapplicable when the declarant is a child of any age who answers an officer's questions. In holding that the primary purpose of the police officer is the only relevant factor, the Ohio Supreme Court ignored all language in ***Crawford v. Washington*** and ***Davis v. Washington*** to the effect that the purpose and understanding of the declarant matters. In fact, the Ohio Supreme Court, at Appendix A-19, incorrectly said that this court in ***Davis v. Washington*** did not

consider the expectations of a declarant significant.

On the contrary, the decision in ***Davis*** is not a departure from ***Crawford*** but a reaffirmation. This Court in ***Davis*** never said that the primary purpose test applied only to an officer's purpose. Rather the court used the phrase the "primary purpose of the interview." This court relied both on the purpose of the 911 caller and the purpose of the police. Because the evil that the Confrontation Clause is intended to protect against is an absent accuser, when deciding whether a statement is testimonial, the state of mind of the declarant should be at least as important as the state of mind of the officer asking the questions.

For statements to be "testimonial," Petitioner submits, there must be some intent or understanding by the declarant that the statements will likely be used in court. While a seventeen year old child may understand legal proceedings as well as the adults in ***Davis*** and ***Hammon v. Indiana*** 547 U.S. 813, 126 S. Ct. 2266 (2006), it is unlikely that a very young child would ever contemplate legal proceedings.

The instant case is similar to ***White v. Illinois***, 502 U.S. 346, (1992), in which statements of a four-year-old victim to a police officer had been admitted at trial as excited utterances. The defendant argued that the confrontation clause required that such statements be excluded unless the state

produced the declarant at trial or proved that the declarant was unavailable. This court rejected that argument.

This court in ***Crawford v. Washington***, 541 U.S. 36 (2004), describes ***White v. Illinois*** as a "minor, arguable exception." (f.n. 8 and 9,). It is unclear whether the word "arguable" means that the statements in ***White*** were "testimonial." The exception that the Ohio Supreme Court established for children, however, is that all children's statements are testimonial, regardless of the understanding or age of the child, if the purpose of the police is to investigate a prior event. That test would allow a seventeen-year-old who is a good actor to frantically call for help and

disappear before police arrived. Because the police were responding to an on-going emergency, the declarant's deliberate statements would be "non-testimonial." At the same time, the Ohio Supreme Court's test would keep out important statements of a child who is too young to communicate other than by responding to questions and too young to understand that he is even making an accusation.

The lower court erred in ruling that every statement Nathan Siler made in response to questions by a police officer was "testimonial." The questioner's being a police officer, the lower court decided, was, under, ***Davis v. Washington***, 126 S.Ct.

2266(2006) and ***Hammon v. Indiana*** 126 S. Ct. 2266 (2006), dispositive.

Davis and ***Hammon*** both involved domestic abuse of adult women. In ***Davis***, a woman who was being attacked called 911. Responding to the operator's questions, the woman named her attacker, then said he was leaving. Those statements, the court held, were non-testimonial. Neither the 911 operator nor the woman was contemplating court proceedings. Later statements made by the victim in ***Davis***, the court held, were testimonial. In ***Hammon***, police officers, responding to a domestic violence call, found a woman sitting on her porch. She said she was fine. Later, inside the house, after the defendant had been restrained, she reported

abuse. Still later, she signed an affidavit. This Court held all incriminating statements in ***Hammon*** testimonial. In both cases, the court said, a reasonable person would have understood that the statements she made after the defendants left could be used in court.

Davis and ***Hammon*** are fact specific and amount to a finding that, as a matter of law, statements made under the circumstances in ***Davis*** and ***Hammon*** are testimonial, and, therefore, excluded by ***Crawford***. This Court, however, limited the holding in ***Davis*** and ***Hammon*** to cases "like" them. The court in ***Davis*** and ***Hammon*** itself qualifies its holding to make it clear that the court does not mean that the

only thing that matters is the purpose of the police. In the footnote to the holding, note 1, page 2274, the court explains that some statements might be testimonial, even if the police have no purpose and ask no questions. The last sentence of that same footnote is "And of course, even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the confrontation clause requires us to evaluate."

The distinction in ***Davis*** between what is happening and what has happened applies also to the declarants in those cases. The purpose of a declarant who calls 911 is to summon help. Once help is on the way, the purpose is accomplished. The declarants

in ***Davis***, after the police are on the scene, the court said, would reasonably understand that statements to the police may be used in court. The primary purpose test of ***Davis*** and ***Hammon*** does not eliminate the requirement discussed in ***Crawford*** and adopted by the Ohio Supreme Court in ***State v. Stahl*** (2006) 111 Ohio St.3d 186, 2006-Ohio-5482 that the declarant understand that statements could be used in court. Rather, the court in ***Davis*** and ***Hammon*** quickly found that the adults in question understood that their statements could be used in court and moved to the second step of deciding the primary purpose of the police officer.

Very young children, however, cannot understand the "legal ramifications" of their statements, even when made to police officers. In ***Davis*** and ***Hammon***, the declarants were both adults who had called the police asking for help. A person who calls the police because that person is being attacked, implicitly understands that a crime has been committed. Such a person also knows that the police investigate crimes. Very young children have no such understanding.

If this court meant to hold that statements to a police officer were always testimonial, regardless of the understanding of the declarant, the court would have said so. Rather, this court is deciding each case

on its facts and urging lower courts to do the same. ***Davis*** and ***Hammon*** both involved adults talking to police officers whom they themselves had called. Normal adults understand that the police investigate crime, that hitting people is illegal, and that people who do illegal things often are brought to trial.

Three-year-old Nathan Siler, however, understood none of those things. He did not know enough to call 911 when he could not awaken his mother. He may not have known that Detective Martin was a police officer. Detective Martin had never been to the Siler home. Detective Martin wore plain clothes and talked to Nathan in Nathan's yard as Nathan sat on his grandfather's lap. At least

before lunch, the purpose of Nathan's conversation was, in Nathan's mind, to "Find Mommy." Moreover, Nathan had no reason to believe that his statements would get his father into trouble of any kind, much less be used in court. Nathan had seen his father hit or choke his mother at least three times. Although uniformed deputy sheriffs came, nothing happened to his father. Nathan had no reason to believe that the consequences of his father's having choked his mother would be any different this time. Nathan obviously did not understand that his mother was dead, as he said she was sleeping standing up.

After lunch, the tone of the conversation changed. Detective Martin's

demonstration with the case worker was more obviously intended for use at trial. Nathan also seems to have developed a sense that this time something was different from the three other times his father had choked his mother, as Nathan was crying. If the statements after lunch were testimonial, admitting them was harmless error. Ample other evidence proved how Mrs. Siler died. Nathan's first statements that Daddy and Mommy fought in the garage established, along with other evidence, that Respondent killed her. The Ohio Supreme Court erred in considering the two statements as one.

Petitioner respectfully suggests that a three-year old child is incapable of contemplating court proceedings, thus

rendering any statement of a three-year-old child "non-testimonial." That does not mean that a statement of a three-year-old would always be admissible; the statement would still have to fit within a hearsay exception.

The evil that both the Confrontation Clause and the cases of ***Crawford v. Washington*** and ***Davis v. Washington*** seek to protect defendants against is not the limited expressions of three-year-olds but the star-chamber tactics of trial by affidavit. Equating statements to a police officer with star-chamber tactics assumes at least a basic understanding that the declarant is "accusing" someone and that serious consequences may occur from the accusation.

CONCLUSION

The Ohio Supreme Court held that when deciding whether a statement is "testimonial," either ***Crawford*** or ***Davis*** applies, but not both. Purporting to follow ***Davis***, the Ohio Supreme Court applied only half of the case, holding that the only significant factor is the purpose of the police officer. This Court limited the holdings in ***Davis*** and ***Hammon*** to their facts. The facts in ***Davis*** and ***Hammon*** are 1) an adult 2) called the police for help and 3) made statements she knew were relevant to a crime. Three-year-old Nathan Siler, who thought his mother was "sleeping standing up," answered questions asked by a man in

plain clothes whom he had never seen before, as he urged that person to "Find Mommy." It is unclear whether Nathan even knew the detective was a police officer. It would never occur to a reasonable three-year-old, under the circumstances of the instant case, that his statement would be available for use at a later trial.

A state court is not free to apply the federal constitution in a different way from that applied by this court. This court has said that whether a statement is "testimonial" depends upon the facts of each case, including the knowledge of the declarant.

The Ohio Supreme Court could have, consistent with ***Davis***, adopted either a

reasonable child standard or considered a child's age as one of the circumstances relevant to deciding whether a reasonable person, under all the circumstances, would understand that the person's statement would be used at trial. Instead, the court ruled that when children make statements to police officer's, the age and understanding of the child are irrelevant and only the purpose of the police matters. Petitioner believes that this court never intended that result and asks that the Ohio Supreme Court decision be reversed.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF OHIO FILING:

Opinion,
filed 10/25/07 ..... A1 - A34

ASHLAND COUNTY COURT OF APPEALS FILINGS:

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filed 12/13/05 ..... B1 - B19

OTHER:

Fourteenth Amendment,
United States Constitution ..... C1 - C3

THE STATE OF OHIO, APPELLANT, v.
SILER, APPELLEE.
[Cite as State v. Siler, 116 Ohio St.3d 39,
2007-Ohio-5637.]

Constitutional right to confront witnesses — Hearsay statements by child declarant to police investigator are testimonial — Age of declarant not determinative of whether statements are testimonial.

(No. 2006-0185—Submitted June 5, 2007 – Decided October 25, 2007.)
APPEAL from the Court of Appeals for Ashland County, No. 02 COA 028, 164 Ohio App.3d 680, 2005-Ohio-6591.

SYLLABUS OF THE COURT

1. To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006), __ U.S. __, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, followed.)

2. A declarant's age is not determinative of whether a testimonial statement has been made during a police interrogation.

O'DONNELL, J.

{¶ 1} The state of Ohio appeals from a decision of the Ashland County Court of Appeals that reversed Brian Siler's convictions for aggravated murder and five other offenses and held that the admission of hearsay statements of his three-year-old son at his trial denied him his Sixth Amendment right to confront witnesses against him because his child did not testify at trial and because he had no prior opportunity to cross-examine him.

{¶ 2} The focus of this appeal concerns whether a child's statements made in the course of a police interrogation to a sheriff's deputy should be considered testimonial or nontestimonial, as explained in *Crawford v. Washington* (2004), 541 U.S.

36, 124 S.Ct.1354, 158 L.Ed.2d 177, *Davis v. Washington* (2006), __ U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224, and *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834. After careful review, we have concluded that the statements made to the deputy sheriff were testimonial because the circumstances objectively indicate that no ongoing emergency existed and that the primary purpose of the police interrogation was to establish past events potentially relevant to a later criminal prosecution. Accordingly, we affirm the decision of the court of appeals.

Facts and Procedural History

{¶ 3} Brian and Barbara Siler married in 1988 and had one child, Nathan, born in July 1998. In June 2001, Brian discovered that Barbara had been having an affair with one of her co-workers. In the ensuing weeks, Barbara placed several 911 calls to sheriff's deputies due to arguments with Brian. No criminal charges arose from these calls, but Barbara frequently expressed her fear of Brian to friends and family.

{¶ 4} On July 30, 2001, after an incident in which Brian allegedly choked her, Barbara obtained a civil protection order that required Brian to surrender his house keys and garage door openers

and to stay at least 300 feet away from her; it also established a schedule for him to visit Nathan, who continued to live with Barbara. As a result, Brian moved in with his brother and sister-in-law, who lived about five or six miles away. Barbara subsequently filed for divorce, and Brian told several people that he wanted to hurt her as much as she had hurt him.

{¶ 5} On September 20, 2001, Duane Keener, Barbara's father, received a phone call from Barbara's employer, the accounting firm of Whitcomb & Hess, expressing concern that she had not reported to work that day. After unsuccessfully trying to reach her by phone, Keener drove to her house. Upon arrival, he looked through the garage window, noticed that the door to her van was open, and discovered that he could open the side door to the garage by pushing on it. He entered and continued into the house but did not see anyone. Growing worried, he went back outside and called 911.

{¶ 6} Deputy Ron Singleton and Captain Richert of the Ashland County Sheriff's Office responded to the 911 call and met him around 2:00 p.m. They went into the garage and found Barbara Siler's body hanging from a yellow cord tied to the track of the overhead garage door. The Ashland

County Coroner, Dr. William Emery, later estimated that her death occurred eight to ten hours earlier, sometime between 4:00 and 6:00 a.m. that morning.

{¶ 7} Singleton continued into the house by himself and discovered three-year-old Nathan asleep in one of the bedrooms. Upon waking him, he carried Nathan outside through the garage to his grandfather, shielding the child from any view of his mother.

{¶ 8} Detective Larry Martin, a trained child interviewer, arrived shortly thereafter wearing plain clothes with a vest that concealed his badge and gun. While Nathan sat on his grandfather's lap, Martin lay next to them on the ground and began talking to Nathan. Nathan eventually began to ask for his mother and to go back into the house; according to Martin, Nathan also said that his mother was in the garage "sleeping standing." As a result of the questioning, Martin learned that Nathan's father, Brian, had been there the previous night, that he had scared Nathan by banging on the door, and that he had fought with Barbara in the garage. Nathan also told Martin that Brian had placed the yellow rope around her neck.

{¶ 9} The state indicted Brian Siler in December 2001 on two counts of aggravated murder

with death-penalty specifications, two counts of domestic violence, and single counts of endangering children, aggravated burglary, and violation of a protection order. He pleaded not guilty, and a trial commenced in May 2002. As part of its case-in-chief, the state called Deputy Singleton and Detective Martin to testify about Nathan's statements, and, over Siler's repeated objections, the trial court admitted the testimony as excited utterances pursuant to Evid.R. 803.

{¶ 10} On direct examination, Singleton testified that when he carried Nathan from the house, he asked Nathan, "Was daddy here today?" to which Nathan answered "no," and he testified that Nathan told him to "[f]ind mommy," pointing to the garage. On cross-examination, Singleton stated that Nathan did not cry or resist at any point.

{¶ 11} Martin testified that he had been briefed upon his arrival at the scene and before he began speaking with Nathan. He stated that when interviewing a child, he would "attempt to identify what information the child might have as to what had happened." He further testified that when he asked Nathan if anything had scared him the night before, Nathan responded, "Daddy did" by "[k]nocking loudly," and jumped up and

demonstrated by banging on the front door. Martin stated that he asked if anything else had scared Nathan and that Nathan answered, "Daddy, mommy fighting" in the garage.

{¶ 12} Martin also testified that 30 to 45 minutes into his questioning, Nathan said that he was hungry and thirsty, and Martin arranged for him to have lunch with Terrie Cato, a nurse employed by the Ashland County Sheriff's Office and a friend of Barbara and Brian Siler.

{¶ 13} Martin further stated that when they returned from lunch, he again spoke with Nathan, this time in the presence of Jenny Taylor, a children's services investigator who had arrived at the scene. He asked "if anyone was hurting mommy," to which Nathan responded, "Daddy did." Using a teddy bear that had been brought to the scene, Martin asked Nathan to demonstrate how daddy had hurt mommy, but Nathan did not respond. Martin then placed Taylor in different holds, asking Nathan, "Was this how daddy was hurting mommy?" When he placed his arm around the investigator's shoulder from behind, Nathan told him to move his arms up. Martin demonstrated, and Nathan said, "yes," and began crying; until this point in the interrogation, Martin stated, the child had not seemed nervous, upset, or in

any distress. Nathan told Martin that "the yellow thing" held mommy upright in the garage, and, when Martin asked who put the yellow thing on her, the child responded, "Daddy." Martin did not question him further.

{¶ 14} Among other witnesses, the state also called Dr. Andrea McCollom, a forensic pathologist, who testified that Barbara's body displayed injuries that were inconsistent with suicide; rather, in her opinion, Barbara had been hanged after she had died from injuries caused by cervical compression consistent with a choke hold applied from behind.

{¶ 15} At the conclusion of the guilt phase of the trial, the jury found Siler guilty of all counts and specifications and, after the penalty phase, unanimously recommended the death penalty. However, the court rejected the recommendation and instead imposed a sentence of life imprisonment without parole.

{¶ 16} Siler then appealed to the Ashland County Court of Appeals and raised several assignments of error, including a Sixth Amendment challenge to the admission of Nathan's statements to Martin. The appellate court overruled that assignment of error, determined that Nathan's statements were admissible as excited utterances

pursuant to Evid.R. 803(2), and affirmed the convictions. *State v. Siler*, Ashland App. No. 02-COA-028, 2003-Ohio-5749. We denied review of his appeal. *State v. Siler*, 101 Ohio St.3d 1489, 2004-Ohio-1293, 805 N.E.2d 539.

{¶ 17} Siler then appealed to the United States Supreme Court, which granted certiorari, vacated the judgment of the court of appeals, and remanded the case with instructions to reconsider the Sixth Amendment issue in light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494. On remand, the appellate court reversed Siler's convictions and remanded for a new trial, holding that Nathan's statements to Detective Martin were testimonial and that their admission during trial violated Siler's Sixth Amendment right to confront witnesses against him, stating, "there is presently no cognizable dispute concerning whether the child was unavailable * * * and whether defense counsel was given a prior opportunity to cross-examine him." *State v. Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, ¶49. The appellate court explained, "Martin's questioning of Nathan, although resulting in allowable 'excited utterances' under the Ohio Rules of Evidence, was

nonetheless a structured police interrogation as envisioned in *Crawford*, and therefore constituted testimonial evidence." Id. The court further held that the erroneous "admission of Nathan's statements was not harmless beyond a reasonable doubt." Id. at ¶ 50.

{¶ 18} The state appealed the decision that Nathan's statements to Martin were testimonial, contending that the appellate court misapplied *Crawford* and contravened our subsequent holding in Stahl when it concluded that Nathan's statements were testimonial because they resulted from police interrogation. The state urges that Nathan's statements should not be considered testimonial, asking us to apply the objective-witness test established in *Stahl* and to consider the statements from the perspective of a three-year-old declarant, who could not have understood that his statements would be available for use at a later trial.

{¶ 19} Siler, on the other hand, asserts that the objective-witness test adopted in *Stahl* is inapposite because Stahl involved statements made to a nurse for medical purposes, not to law-enforcement officers for investigatory purposes. He contends that in *Davis v. Washington* (2006), ___ U.S. ___, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, the court set forth a different test that applies to statements generated

from police interrogation, and he argues that *Davis* stands for the proposition that when the primary purpose of the police interrogation is to determine what has occurred in the past, without regard to an ongoing emergency, then the statements generated are testimonial for purposes of Confrontation Clause analysis, regardless of the age of the declarant.

{¶ 20} Thus, we are called upon to set forth an appropriate test for courts to apply when faced with a Sixth Amendment challenge to statements made by a child declarant in response to police interrogation.

Crawford, Davis, and Stahl

{¶ 21} In *Crawford*, the United States Supreme Court held that the proper analysis for determining whether out-of-court statements violate the Confrontation Clause is not whether they are reliable but, rather, whether they are testimonial. 541 U.S. at 61, 124 S.Ct. 1354, 158 L.Ed.2d 177. The court went on to state that the Confrontation Clause does not apply to nontestimonial hearsay but that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68.

{¶ 22} Although the court expressly declined to set forth a comprehensive definition for the term

"testimonial," it described three "formulations of this core class of 'testimonial' statements," one of which includes statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id., 541 U.S. at 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177, quoting the brief of amicus curiae National Association of Criminal Defense Lawyers. The court further stated, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.*" (Emphasis added.) Id. at 68.

{¶ 23} Two years after its decision in *Crawford*, the court revisited the issue of testimonial statements in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (2006), ___ U.S. ___, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224. *Davis* involved statements that a domestic-violence victim made to a 911 operator identifying her assailant and describing his whereabouts immediately after an assault, while *Hammon* involved statements made to police officers responding to a domestic-violence complaint after they had secured the scene. Id., ___ U.S. at ___, 126 S.Ct. at 2270-2272, 165 L.Ed.2d 224..

{¶ 24} In considering whether the statements in these cases were testimonial, the court distinguished between police interrogations that concern an ongoing emergency and those that relate to past criminal conduct. Id., ___ U.S. at ___, 126 S.Ct. at 2276-2278, 165 L.Ed.2d 224. Thus, it formulated what courts around the country have come to refer to as the primary-purpose test (see, e.g., *People v. Geier* (2007), 41 Cal.4th 555, 61 Cal.Rptr.3d 580, 161 P.3d 104; *State v. Kirby* (2006), 280 Conn. 361, 908 A.2d 506): "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ___ U.S. at ___, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224.

{¶ 25} Applying that test, the court determined that "the circumstances of [the 911] interrogation [in *Davis*] objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." Id., ___ U.S. at ___, 126 S.Ct. at 2276.

Accordingly, those statements were nontestimonial. Id. In *Hammon*, however, the court stated, "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." Id., ___ U.S. at ___, 126 S.Ct. at 2278. Therefore, the court held that those statements were testimonial. Id.

{¶ 26} In *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, we considered whether an adult rape victim had made testimonial statements to a nurse practitioner during a medical examination at a hospital DOVE unit specializing in health care for victims of rape and domestic violence. There, for analysis of a statement made to a medical professional, we adopted the objectivewitness test from *Crawford*, stating, "For Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id. at paragraph one of the syllabus, quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. We further held, "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a

questioner is relevant only if it could affect a reasonable declarant's expectations." Id. at paragraph two of the syllabus.

{¶ 27} In *Stahl*, we expressly acknowledged *Davis* and *Hammon* but distinguished them, stating, "They involve statements made to law-enforcement officers, while the statement at issue here covers one made to a medical professional at a medical facility for the *primary* purpose of receiving proper medical treatment and not investigating past events related to criminal prosecution." (Emphasis sic.) 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶25. Applying the objective-witness test, instead, we concluded that the statements made by the rape victim to the nurse were nontestimonial because she "could have reasonably believed that although the examination conducted at the DOVE unit would result in scientific evidence being extracted for prosecution purposes, the statement would be used primarily for health-care purposes." Id. at ¶47.

The Primary-Purpose Test

{¶ 28} Although the state and amicus curiae, the American Prosecutors Research Institute ("APRI"), invite us to apply the objective-witness test, as we did in *Stahl*, we decline to do so because the

primary-purpose test enunciated in *Davis* is the more appropriate analysis. Contrary to the assertions of the state and APRI, *Stahl* is factually distinguishable from the instant case based on the identity of the interrogator and the purpose of the questioning. The distinction is as significant here as it was in *Stahl*, where we specifically concluded that the objective-witness test applied, rather than the primary-purpose test in *Davis*, because of the *lack* of a law-enforcement interrogator. 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶25. Moreover, the court in *Davis* acknowledged that its "holding is not an 'exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,' *supra*, [___ U.S. at ___, 126 S.Ct.] at 2273 165 L.Ed.2d 224], but rather a resolution of the cases before us *and those like them*." (Emphasis added.) ___ U.S. at ___, 126 S. Ct. at 2278, 165 L.Ed.2d 224, fn. 5.

{¶ 29} Since *Davis*, courts have consistently applied the primary-purpose test to statements that a child declarant made to police or those determined to be police agents, and we are aware of no courts that continue to apply the objective-witness test in such cases. See, e.g., *People v. Cage* (2007), 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (15-year-old's

statements to police); *People v. Sharp* (Colo.App.2006), 155 P.3d 577 (five-year-old's statements to forensic interviewer during visit arranged by police); *Hernandez v. State* (Fla.App.2007), 946 So.2d 1270 (statements made by child of unknown age to "Child Protection Team" nurse); *People v. Stechly* (2007), 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333 (five-year-old's statements to child-sex-abuse personnel); *State v. Henderson* (Kan.2007), 160 P.3d 776 (three-year-old's statements to police and child-protective-services worker); *State v. Justus* (Mo.2006), 205 S.W.3d 872 (three-year-old's statements to child-abuse investigators); *State v. Buda* (2006), 389 N.J.Super. 241, 912 A.2d 735 (three-year-old's statements to youth-services worker); *State v. Blue*, 2006 N.D. 134, 717 N.W.2d 558 (four-year-old's statements to forensic interviewer with police observing); *In re S.R.*, 2007 Pa.Super. 79, 920 A.2d 1262 (four-year-old's statements to forensic interview specialist); *State v. Hooper* (Aug. 11, 2006), Payette App. No. 31025, ___ Idaho ___, ___P.3d ___, 2006 WL 2328233 (six-year-old's statements to sexual trauma personnel during visit arranged and observed by police).

{¶ 30} Thus, we conclude that to determine whether a child declarant's statement made in the

course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington* (2006), __ U.S. at __, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224.

{¶ 31} Having determined that the primary-purpose test applies in this instance, we next consider the argument of the state and APRI that a child's statements to police are nontestimonial when the child, because of his or her age and limited understanding of court or trial, could not reasonably expect that those statements may be used in a later criminal proceeding.

{¶ 32} We recognize, as did the court of appeals in this case, that "younger children have lesser reflective capabilities," *Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, at ¶ 9, citing *State*

v. Wagner (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164; we further acknowledge the authorities submitted by APRI indicating that children lack an understanding of court proceedings and testimony. See, e.g., R. Friedman, The Conundrum of Children, Confrontation, and Hearsay (2002), 65 Law & Contemp.Prob. 243, 251-252.

{¶ 33} The court's analysis in *Davis*, however, does not focus on the expectations of the declarant in order to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation. ___ U.S. at ___, 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224. In this way, the argument by the state and APRI that we should focus on the cognitive limitations of a child who made the statements to police is inconsistent with the primary-purpose test.

{¶ 34} The state and APRI cite numerous cases in support of their position that statements made by child declarants are nontestimonial because of their lack of understanding. Those cases are inapposite, however, because they do not concern statements that a child made to law-enforcement officers or to individuals held to be agents of law enforcement. *See*

People v. Vigil (Colo.2006), 127 P.3d 916 (seven-year-old's statements to doctor, father, and father's friend); *Commonwealth v. DeOliveira* (2006), 447 Mass. 56, 849 N.E.2d 218 (six-year-old's statements to doctor); *State v. Scacchetti* (Minn.2006), 711 N.W.2d 508 (three-year-old's statements to nurse); *State v. Brigman* (2006), 178 N.C.App. 78, 632 S.E.2d 498 (children's statements to mother); *State v. Johnson*, Butler App. No. CA 2005-10-422, 2006-Ohio-5195 (nine-year-old's statements to medical staff); *State v. Copley*, Franklin App. No. 04AP-1128, 2006-Ohio-2737 (three-year-old's statements to mother); *State v. Muttart*, Hancock App. No. 5-05-08, 2006-Ohio-2506 (five- and six-year-old children's statements to medical professional), affirmed in part and reversed in part, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944; *United States v. Coulter* (2005), 62 M.J. 520 (two-yearold's statements to mother).

{¶ 35} Only one case cited by the state and APRI concludes that a child's statements made during a police interrogation were nontestimonial: *Lagunas v. State* (Tex.App.2005), 187 S.W.3d 503. There, police responding to a 911 call found an injured woman who had been abducted from her home but who had managed to escape her captor. She

told the police that her two children, ages two and four, were still at home, and an officer was dispatched to check on their safety. Upon arrival, the officer entered the house, found the children in bed, and asked the four-year-old if everything was okay. As the *Lagunas* court recounted, "[The child] responded that it wasn't and added, 'Her mommy was dead.' At this point, [the officer] asked [her] what happened to her mother. She responded, 'A bad man had killed her and took her away' and grew more upset. * * * He did not question [her] further." *Lagunas*, 187 S.W.3d at 520. The Texas court of appeals concluded that the child's statements were nontestimonial after applying the objective-witness test, in which it considered the age of the child.

{¶ 36} The court's analysis and decision predated the establishment of the primary-purpose test in *Davis*. Moreover, although the court in *Lagunas* considered the child's age in its analysis, it specifically stated, "We need not decide now whether, as a general rule, statements by children are inherently non-testimonial or whether [the child's] age alone renders her statements non-testimonial." 187 S.W.3d at 519. Furthermore, the court's analysis paralleled the analysis in *Davis* by focusing on the purpose of the interrogation; as the *Lagunas* court

explained, the officer's questioning of the child "was closer in nature to a preliminary question in which [the officer] sought to clarify [the child's] spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Instead, [the officer's] questions were consistent with the behavior of a reasonable adult seeking (in some ways successfully, in some ways not) to calm a frightened child in the middle of the night. Significantly, after calming [the child], [the officer] asked her no further questions regarding the circumstances of her mother's disappearance." Id. at 520. Thus, *Lagunas* supports the conclusion not only that the primary-purpose test is appropriate in cases involving police interrogation of a child but also that the declarant's age is not dispositive when determining whether statements to police are testimonial.

{¶ 37} We similarly distinguish *State v. Bobadilla* (Minn.2006), 709 N.W.2d 243, which APRI primarily relies upon for the proposition that a child's limited cognitive ability renders his statements nontestimonial. There, a three year old sex-abuse victim made statements to a child-protection worker during a risk-assessment interview while a police detective observed. The Minnesota Supreme Court

held that the child's statements were nontestimonial because "the interview of [the child] was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child" and because "neither [the child] nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial, and therefore [the child's] statements in the assessment interview were not testimonial." *Bobadilla*, 709 N.W.2d at 255-256.

{¶ 38} Although the court acknowledged the child's limited cognitive abilities, this was not, as APRI claims, the focal point of its analysis; rather, the purpose of the interview constituted the dispositive issue: "If part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to [the child's] health and welfare." Id. at 255. Moreover, as with *Lagunas*, the court decided *Bobadilla* without the benefit of the analysis that the United States Supreme Court set forth in *Davis*.

{¶ 39} We are aware of no case in which a court has concluded that a declarant's age rendered statements to police nontestimonial. Rather, courts have held that children's statements to police or police agents are testimonial in circumstances that indicate that no ongoing emergency existed and that the primary purpose of the interrogation was to establish past events potentially related to later criminal prosecution. See, e.g., *T.P. v. State* (Ala.Crim.App.2004), 911 So.2d 1117 (eight-year-old's statements to social worker and investigator as part of criminal investigation); *People v. Cage*, 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (15-year-old's statements to police); *People v. Sisavath* (2004), 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (four-year-old's statements to police); *People v. Sharp*, 155 P.3d 577 (five-year-old's statements to forensic interviewer during visit arranged by police); *People ex rel. R.A.S.* (Colo.App.2004), 111 P.3d 487 (four-year-old's statements to police); *Hernandez v. State*, 946 So.2d 1270 (statements made by child of unknown age to "Child Protection Team" nurse); *State v. Grace* (Haw.App.2005), 107 Hawai'i 133, 111 P.3d 28 (ten- and eleven year-old children's statements to police); *State v. Hooper*, Payette App. No. 31025, ___ Idaho ___, ___ P.3d ___, 2006 WL 2328233 (six-year-old's

statements to sexual trauma personnel during visit arranged by police); *People v. Stechly*, 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333 (five-year-old's statements to child-sex-abuse personnel); *State v. Henderson*, 160 P.3d 776 (three-year-old's statements to police and child-protective-services worker); *State v. Snowden* (Md.App.2005), 385 Md. 64, 867 A.2d 314 (eight- and ten-year-old children's statements to sex-abuse personnel during police investigation); *State v. Justus*, 205 S.W.3d 872 (three-year-old's statements to child-abuse investigators); *State v. Blue*, 2006 ND 134, 717 N.W.2d 558 (four-year-old's statements to forensic interviewer with police observing); *State v. Buda*, 389 N.J.Super. 241, 912 A.2d 735 (three-year-old's statements to youth-services worker); *State v. Mack* (2004), 337 Or. 586, 101 P.3d 349 (three-year-old's statements to case worker in an interview directed by the police); *In re S.R.*, 2007 Pa.Super. 79, 920 A.2d 1262 (four-year-old's statements to forensic interview specialist); *Rangel v. State* (Tex.App.2006), 199 S.W.3d 523 (six-year-old child's statements to child protective services); *United States v. Bordeaux* (C.A.8 2005), 400 F.3d 548 (statements by child of unknown age to forensic interviewer).

{¶ 40} Significantly, several courts have expressly rejected the state's and APRI's argument that a child's statements are necessarily nontestimonial when the child would not be able to understand that the statements would be used in a later criminal proceeding. *State v. Henderson*, 160 P.3d at 785, citing *State v. Justus*, 205 S.W.3d 872 ("A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial"); *State v. Snowden*, 385 Md. at 89-90, 867 A.2d 314 ("we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants"); *Commonwealth v. DeOliveira*, 447 Mass. at 66, 849 N.E.2d 218 (declining to adopt the same argument that APRI presents here); *People v. Vigil*, 127 P.3d at 926, fn. 8 ("if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial"); see, also, *State v. Hooper*, Payette App. No. 31025, ___ Idaho ___, ___ P.3d ___, 2006 WL 2328233, *17.

{¶ 41} Thus, we conclude that the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation.

{¶ 42} Our conclusions in this case regarding a police interrogation of a child do not affect our decision in *Stahl*, which applied the objective-witness test to determine whether a declarant had made testimonial statements during an interview conducted by a nurse at a DOVE unit for purposes other than to investigate a past crime. In this regard, we agree with the Supreme Court of Illinois, in *People v. Stechly*, which recently concluded that the objective-witness test applied to statements that a five-year-old child made to her mother but that the primary-purpose test set forth in *Davis* applied to statements that she made during an interrogation conducted by an agent of the police. 225 Ill.2d at 299-302, 312 Ill.Dec. 268, 870 N.E.2d 333. See, also, *Vigil*, 127 P.3d at 926, fn.8 (applying the objective-witness test to a child's statements to a nonpolice questioner but stating that the child's statements to police during an investigation are testimonial regardless of child's expectations); and *State v. Mechling* (2006), 219 W.Va. 366, 633 S.E.2d 311 (the objective-witness test applies, generally, but statements generated

from police interrogation require application of the analysis in *Davis*); but see *State v. Alvarez* (App.2006), 213 Ariz. 467, 143 P.3d 668; and *People v. Cage*, 40 Cal.4th 965, 56 Cal.Rptr.3d 789, 155 P.3d 205 (holding that after *Davis*, the objective-witness test no longer applies).

Application of the Primary-Purpose Test in This Case

{¶ 43} The record reveals that before Detective Martin arrived at the scene, Deputy Singleton had entered the home, awakened Nathan, and taken him outside. The Ashland County Sheriff's Office had secured the crime scene and had begun its investigation into Barbara's death. Martin testified that he had been briefed before he began questioning Nathan, that Nathan did not appear nervous or upset, and that Nathan was sitting in his grandfather's lap during the questioning. Thus, this record does not reflect the existence of an ongoing emergency.

{¶ 44} Martin identified the primary purpose of Nathan's questioning when he testified that he would "attempt to identify what information the child might have as to what had happened." In addition, Nathan's statements concerned what had occurred the night before in relation to Martin's effort to

establish past events possibly relevant to a criminal prosecution.

{¶ 45} The interrogation before us parallels that in *Hammon*, where the court stated: "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct * * *. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything * * *. When the officers first arrived, [the declarant] told them that things were fine, * * * and there was no immediate threat to her person." ___ U.S. at ___, 126 S.Ct. at 2278, 165 L.Ed.2d 224. The court further stated, "[The declarant's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation * * *." Id., ___ U.S. at ___, 126 S.Ct. at 2279, 165 L.Ed.2d 224.

{¶ 46} As the court stated with respect to the interrogation in *Hammon*, "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime * * *." Id. at 2278. We conclude that the same is true of this interrogation.

Conclusion

{¶ 47} In conformity with Davis and the weight of authority in other jurisdictions, we conclude that Nathan made testimonial statements to Detective Martin, and as a result we are constrained to affirm the judgment of the court of appeals. We further agree with the statement by the court of appeals that, for purposes of remand, the Confrontation Clause " 'does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' " *Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863, ¶51, quoting Crawford, 541 U.S. at 59, 124 S.Ct.1354, 158 L.Ed.2d 177, fn. 9.

Judgment affirmed.

MOYER, C.J., and PFEIFER, O'CONNOR, and MCGRATH, JJ., concur.

LUNDBERG STRATTON and LANZINGER, JJ., concur in part and dissent in part.

PATRICK M. MCGRATH, J., of the Tenth Appellate District, sitting for CUPP, J.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 48} I concur in the judgment and in paragraph two of the syllabus only, because the majority unduly limits the primary-purpose rule

stated in paragraph one by referring only to a "child" declarant and expands the scope of the opinion beyond the stated issue.

{¶ 49} As we elaborate our understanding of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct.1354, 158 L.Ed.2d 177, and our examination of Ohio law regarding what statements are testimonial for purposes of the Confrontation Clause, I believe we should articulate clear guidance for judges who must make these decisions initially. In *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, we declined to expand the definition of "testimonial statements" to include statements made to a medical professional for purposes of receiving medical treatment or diagnosis. In *Stahl*, we adopted the "objective witness" formulation set forth in *Crawford* to discover whether statements were made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Stahl* at ¶ 36, quoting *Crawford*, 541 U.S. at 52, 124 S.Ct.1354, 158 L.Ed.2d 177. We adopted the objective-witness test not because the declarant was an adult but because of the identity of the questioner—a medical professional, rather than a law enforcement officer.

{¶ 50} In analyzing whether statements are testimonial, the identity of the questioner is the first issue to resolve. Whenever the interrogators are members of law enforcement, the rule regarding any statements made by a declarant in response is governed by the primary-purpose test, as explained in *Davis v. Washington* (2006), ___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224. If the primary purpose of the police questioning is to elicit statements that relate to an ongoing emergency, the statements are nontestimonial; if the primary purpose is to prove past events that relate to a potential criminal prosecution, they are testimonial. I agree with paragraph two of the syllabus, which makes it clear that age is irrelevant when a declarant is under police interrogation. In other words, the primary-purpose test is used if the police are questioning.

{¶ 51} Assuming the questioner is not a member of law enforcement, as was the case in *Stahl*, the objective-witness standard (at least for an adult) applies: whether the statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 52} The majority opinion frames the issue of the instant case to set forth "an appropriate test for courts to apply when faced with a Sixth Amendment challenge to statements made by a child declarant *in response to police interrogation*." (Emphasis added.) Thus, to the extent that the majority discusses consequences of statements made by children to interrogators who are not law enforcement, the opinion exceeds its self-imposed boundary.

{¶ 53} In my view, it is still an open question whether children, by virtue of their reasoning abilities, should be subject to the objective-witness standard as expressed in *Stahl* when they are questioned by those other than police officers. We should hesitate to express dicta on this issue when the ramifications on any ruling regarding testimonial statements can be so great, particularly where the child is the victim as well as the witness, in, for example, sexual abuse cases. I therefore dissent as to the portion of the opinion that exceeds the issue of the police interrogation of children.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

Ramona Francesconi Rogers, Ashland County Prosecuting Attorney, and Joyce Anderson, Assistant Prosecuting Attorney, for appellant.

David H. Bodiker, Ohio Public Defender, and Jill E. Stone and Craig M. Jaquith, Assistant Public Defenders, for appellee.

Alice Anna Phillips, urging reversal for amicus curiae, American Prosecutors Research Institute.

The STATE OF OHIO, Plaintiff-Appellee,
v.
BRIAN K. SILER, Defendant-Appellant

[Cite as State v. Siler,
164 Ohio App.3d 680, 2005-Ohio-6591]

Court of Appeals of Ohio, Fifth District,
Ashland County.

Case No. 02 COA 028.

Decided Dec. 13, 2005.

Ramona Francesconi Rogers, Ashland County Prosecutor, for appellee.

David H. Bodiker, State Public Defender, Jill E. Stone and Craig Jaquith, Assistant State Public Defenders, for appellant.

WISE, Judge.

{¶ 1} Pursuant to a remand order from the United States Supreme Court, we herein reconsider appellant Brian K. Siler's appeal from his conviction and sentence for murder in the Court of Common Pleas, Ashland County, Ohio. The appellee is the state of Ohio. The relevant procedural facts leading to this appeal are as follows.

{¶ 2} In the early afternoon of Thursday, September 20, 2001, the body of Barbara Siler, the estranged wife of appellant, was discovered hanging by a rope from an overhead door track in her garage in Ashland, Ohio. Nathan Siler, the three-year-old son of appellant and Barbara, was found sleeping in another room. On December 12, 2001, the Ashland County Grand Jury handed down a seven-count indictment against appellant, including aggravated murder and child endangering. Following a five-day trial, the jury returned a verdict of guilty on all counts. Following a mitigation hearing on June 11, 2002, the jury recommended a sentence of death. Nonetheless, the trial court sentenced appellant to life in prison without parole. On July 29, 2002, appellant filed a notice of appeal, raising 13 assignments of error. On October 24, 2003, this court affirmed the conviction and sentence, holding inter alia that the trial court did not commit reversible error in allowing Ashland County Sheriff's Detective Larry Martin's testimony concerning Nathan Siler's statements made to him on September 20, 2001, as excited utterances under Evid.R. 803(2). See *State v. Siler*, Ashland App. No. 02COA028, 2003-Ohio-5749, 2003 WL 22429053 ("*Siler I*").

{¶ 3} The Ohio Supreme Court thereafter declined to accept review of appellant's case. See *State v. Siler*, 101 Ohio St.3d 1489, 2004-Ohio-1293, 805 N.E.2d 539. The court thereafter also denied reconsideration of that decision. See *State v. Siler*, 102 Ohio St.3d 1462, 2004-Ohio-2569, 809 N.E.2d 34.

{¶ 4} Appellant then filed a petition for a writ of certiorari with the United States Supreme Court. On December 6, 2004, the United States Supreme Court ordered that the judgment be vacated and that the cause be remanded to this court for further consideration in light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. See *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494.

{¶ 5} Accordingly, appellant herein sets forth the following sole assignment of error:

{¶ 6}"I. The trial court erred in permitting Nathan Siler's hearsay statements to Detective Martin to be admitted as excited utterances, thereby depriving Mr. Siler of his right to confront witnesses, as guaranteed by the 6th and 14th Amendments, U.S. Constitution."

I

{¶ 7} In his sole assignment of error, appellant argues that the trial court allowance of police testimony concerning out-of-court statements made by the child of the victim and appellant deprived appellant of his constitutional right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In light of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, we agree.

{¶ 8} In *Crawford*, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination. The remand in the case sub judice from the United States Supreme Court solely directs us to reconsider our prior decision "in light of *Crawford*." See *Siler v. Ohio* (2004), 543 U.S. 1019, 125 S.Ct. 671, 160 L.Ed.2d 494. Thus, the pressing question before us is whether the child's statements to Detective Martin were "testimonial." If we should answer that question in the affirmative, we would then proceed to

consider whether the child was unavailable and whether defense counsel had been given a prior opportunity to cross-examine him. We would also proceed to a consideration of whether the allowance of the statements constituted mere harmless error. If, on the other hand, we were to conclude that the child's statements are nontestimonial, we would be compelled to affirm appellant's conviction, because we have previously determined that the trial court did not abuse its discretion in allowing them into evidence as "excited utterances" under Evid.R. 803(2).

{¶ 9}*Crawford* does not provide a precise definition of "testimonial" evidence. On the one hand, the Supreme Court recited one definition as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id., 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. Since in the case sub judice we are dealing with a young child witness, we are confronted with the question of whether any three-year-old child witness would ever have the intellectual maturity to

understand that his statements to an officer were going to be used in a later trial, as would an objective adult. Indeed, "[c]ourts around the nation have struggled with the application of *Crawford* to child witnesses, particularly how courts should apply the [aforesaid] concept * * * or whether the proper test should be objective or subjective in nature." *Lagunas v. State* (Aug. 26, 2005), Tex.App.-Austin No. 03-03-00566-CR, 2005 WL 2043678, 187 S.W.3d 503. Ohio appellate courts have recognized that younger children have lesser reflective capabilities. See, e.g., *State v. Wagner* (1986), 30 Ohio App.3d 261, 30 OBR 458, 508 N.E.2d 164. In a related vein, it is generally recognized that admissions and confessions of juveniles require special attention. See *In re Harris* (June 7, 2000), Tuscarawas App. No.1999AP030013, 2000 WL 748087, citing *Haley v. Ohio* (1948), 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224.

Obviously, the Confrontation Clause on its face makes no distinction as to the age of the witness. However, the Supreme Court, in addressing "hearsay exception" statements by young children, has also indicated (although before *Crawford*) that "[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the

Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.' " *White v. Illinois* (1992), 502 U.S. 346, 356, 112 S.Ct. 736, 116 L.Ed.2d 848, quoting *Coy v. Iowa* (1988), 487 U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed.2d 857.

{¶ 10} On the other hand, the vexing questions of the present case cannot escape the plain fact that the Supreme Court in *Crawford* did set forth several concrete examples of "testimonial" evidence: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. "The Court noted these practices bore the closest kinship to the abuses at which the Confrontation Clause was directed, to wit ex parte examinations of witnesses by justices of the peace." *State v. Williams*, Montgomery App. No. 20368, 2005-Ohio-213, 2005 WL 120054, ¶ 19. This becomes our main subquestion; in other words, did Detective Martin's interview of the child constitute an "interrogation" of a witness?

{¶ 11} We first observe that the Supreme Court used the term "interrogation" in its "colloquial, rather than any technical legal, sense." See *Crawford*, 541 U.S. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177, at fn. 4. We also note that the court consistently utilized the term "interrogation" in the opinion rather than "interview" or "questioning." At first blush, one might easily conceive of "interrogation" as police questioning involving an actual suspect, which was clearly not the case in the present appeal. Black's Law Dictionary has defined the term as a "process of questions propounded by police to person arrested or suspected to seek solution of crime." Black's Law Dictionary (5 Ed.1979) 734. However, the *Crawford* court, in its analysis of the roots of the Confrontation Clause and the dangers it was designed to prevent, noted that the courts of England at certain times in history adopted elements of the continental civil-law practice, and therefore "[j]ustices of the peace or other officials examined suspects *and* witnesses before trial." (Emphasis added.) *Crawford*, 541 U.S. at 43, 124 S.Ct. 1354, 158 L.Ed.2d 177. Furthermore, "[t]here is no requirement that a peace officer take someone into custody as a prerequisite to interrogating him." *State v. Martin* (2003), 151 Ohio App.3d 605, 619, 784 N.E.2d 1237. Hence, we

conclude that "interrogation" as defined in *Crawford* applies to questioning of both suspects and witnesses.

{¶ 12} The *Crawford* court further observed that "[j]ust as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation' * * *." *Crawford*, 541 U.S. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177, fn. 4. The court therein declined to further select a definition, because under the facts of that case, the recorded statement made to police by Michael Crawford's wife, Sylvia, "knowingly given in response to *structured police questioning*, qualifies under any conceivable definition." (Emphasis added.) Id.

[2] {¶ 13} In the case sub judice, Detective Martin came upon the scene at about 2:00 p.m. on September 20, 2001, and commenced his interview with Nathan about 20 minutes later. He testified at trial that he had received training in interviewing young children.

The state's presentation at trial of Martin's interviewing procedure is set forth as follows:

{¶ 14}"Q. Are there things you do, Detective, to attempt to facilitate a conversation with a child to make it easier for the child?

{¶ 15} "A. Yes.

{¶ 16} "Q. Tell the jury some of the things you do to make it easier for the child?

{¶ 17} "A. Well, basically I try to like find out their likes, dislikes. Get a basic knowledge of the child. Try to listen intensely as the child is speaking.

{¶ 18} "I've never spoken to a lot of these kids I have spoken to before. Get an understanding how well they receive information. How well they are able to relate that information back to me.

{¶ 19} "A lot of times I'll go one-on-one conversation, which means I use anywhere from baby dolls to teddy bears, things of that nature, to have the child actually talk to a teddy bear or something of that nature instead of talking to an adult. Have him concentrate just looking at the teddy bear like it was the teddy bear he was talking to and not I as a person.

{¶ 20} "I also try to get down to their level, which means if somebody is sitting in a chair, I'll get lower than they are so the child is not looking up at me.

They're looking down at me. If they are on the ground, I'll get on the ground.

{¶ 21} "Q. In this case when you initially approached Nathan, he was on his grandpa's lap, sitting on the ground, correct?

{¶ 22} "A. Correct.

{¶ 23} "Q. How did you talk to him physically? How were you positioned?

{¶ 24} "A. I laid down on my stomach and was talking to him.

{¶ 25} "Q. Was Nathan eventually able to tell you his name?

{¶ 26} "A. Yes.

{¶ 27} "Q. And his age?

{¶ 28} "A. Yes.

{¶ 29} "Q. What he liked to do?

{¶ 30} "A. Yes.

{¶ 31} "Q. What type of questions do you attempt to ask when you're interviewing a child?

{¶ 32} "A. Attempt to locate-or attempt to identify what information the child might have as to what had happened.

{¶ 33} "Q. Did you ask Nathan anything about the evening before?

{¶ 34} "A. I did.

{¶ 35} "Q. What did you ask Nathan?

{¶ 36} "A. Basically what he had did the night before, where he had went.

{¶ 37} "Q. Did he tell you what he had done the night before?

{¶ 38} "A. He did.

{¶ 39} "Q. What did he tell you he had done the night before?

{¶ 40} "A. Went to the fair.

{¶ 41} "Q. And who did he say he had gone to the fair with did he tell you?

{¶ 42} "A. Mommy and Terrie.

{¶ 43} "Q. Did you ask him anything more about the evening before?

{¶ 44} "A. Yes.

{¶ 45} "Q. Tell the jury what you talked about."

{¶ 46} Martin continued asking Nathan some questions about the trip to the county fair the night before, then asked him if anything had scared him that night after returning home. Nathan told him, "Daddy did." Martin then asked him how appellant had scared him, to which the child replied, "Knocking loudly." When Martin asked him what he meant, Nathan jumped off his grandfather's lap, where he had been sitting, and ran to the front door to demonstrate. Martin then asked Nathan if anything else had scared him. Nathan replied, "Daddy, mommy fighting." When asked where this had

occurred, Nathan said it had taken place in the garage.

{¶ 47} Martin initially spoke with the child for about 30 to 45 minutes. At that point, Nathan indicated that he was hungry, and Martin also noted that Nathan was behaving as though he wanted to go back into the house to find Barbara. Martin therefore agreed to let Terrie, Barbara's friend, take the child away from the area to get something to eat. Martin directed Terrie to forbid anyone to question the child during that period.

{¶ 48} When Nathan was brought back to the yard after his meal, Martin, joined by Jenny Taylor, a children's services investigator, asked Nathan if "anyone was hurting mommy" during the prior night's incident. Nathan stated, "Daddy did." Martin then asked Nathan some questions, using Taylor as a mock victim. Martin held Taylor in certain fighting positions, finally standing to the back of Taylor and putting his arm around her in a hold position. Martin then asked Nathan, "Like that?" Nathan replied, "Up." Martin then moved his arm up towards Taylor's neck or throat area. At that point, Nathan said, "Yes," and he started crying.

Martin finally asked Nathan, in reference to the hanging rope, if he knew who had put the "yellow thing" around Nathan's mother. Nathan answered that "daddy" had done it.

{¶ 49} In light of the above testimony, we conclude that Detective Martin's questioning of Nathan, although resulting in allowable "excited utterances" under the Ohio Rules of Evidence, was nonetheless a structured police interrogation as envisioned in *Crawford* and therefore constituted testimonial evidence.[FN1] Because there is presently no cognizable dispute concerning whether the child was unavailable for the pre-*Crawford* trial and whether defense counsel was given a prior opportunity to cross-examine him, and having concluded that Nathan Siler's statements were testimonial evidence under *Crawford*, we must now determine whether the Confrontation Clause error was "harmless beyond a reasonable doubt." See, e.g., *Flores v. Nevada* (Nev.2005), 120 P.3d 1170, 1180, citing *Chapman v. California* (1967), 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705. In order to make this determination, we must inquire "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v.*

Madrigal (2000), 87 Ohio St.3d 378, 388, 721 N.E.2d 52, citing *Chapman*, supra.

> FN1. Appellant also argues that a testimonial statement and an excited utterance are mutually exclusive. However, the Indiana appellate case cited by appellant in support, *Fowler v. State* (Ind.Ct.App.2004), 809 N.E.2d 960, has since been abrogated by the Indiana Supreme Court, which has held that a statement that qualifies as an excited utterance is not necessarily nontestimonial under the Confrontation Clause. See *Hammon v. State* (Ind.2005), 829 N.E.2d 444.

{¶ 50} Having again reviewed the record, we conclude that the admission of Nathan's statements was not harmless beyond a reasonable doubt. Certainly, as we noted in *Siler I*, in the months preceding Barbara's death, she and appellant had experienced significant marital problems, and appellant had been upset about a terminated affair Barbara had carried on with one of her co-workers. In late July 2001, just two months prior to her death, Barbara obtained a temporary protection order. At that point, appellant

moved into the home of his brother, Kevin Siler, and Kevin's wife. On the evening of September 19, 2001, appellant did some basement remodeling work with Kevin and then watched TV with his brother. Kevin's wife went to bed at about 4:00 a.m. on September 20, 2001. About 15 minutes later, she awoke to sounds of banging and "clunking" from appellant's room. When she got up later, appellant and Kevin were gone from the house. Barbara's body was discovered by a sheriff deputy at about 1:45 p.m. that day, after Barbara's father had gone to her residence to check on her. The coroner later estimated her time of death as between 4:00 a.m. and 6:00 a.m. that morning. The outside door into the garage was ajar, as was the door from the garage to the house. Sheriff deputies, interviewing appellant that same day, observed that appellant's hands had red marks near each thumb and some of his fingers. Appellant also had scratch marks on top of some of his knuckles and on his chest, near his neck. The yellow rope around Barbara's neck contained traces of DNA, from which appellant could not be excluded as a source. No similar rope was found in the house. Thus, there was a body of circumstantial evidence pointing to appellant, but we find that this remaining evidence, absent Nathan's statements, does not

provide overwhelming proof of appellant's guilt for purposes of a "harmless error" analysis by this court. Cf. *State v. Goff*, Summit App. No. 21320, 2005-Ohio-339, 2005 WL 236377, ¶ 12, 13. Even if we were to take into consideration, as the state suggests, Nathan's statement to Martin that he had seen "mommy, daddy fighting," an utterance the child made in the early phase of the interview, we would remain unconvinced that the introduction of the remaining statements was harmless.

{¶ 51} Therefore, upon further consideration as directed by the United States Supreme Court, we are persuaded that appellant is entitled to a new trial pursuant to *Crawford*, although we reiterate for purposes of our remand that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Marbury*, Montgomery App. No. 19226, 2004-Ohio-1817, 2004 WL 758404, ¶ 38, citing *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354, 158 L.Ed.2d 177, fn. 9.

{¶ 52} Appellant's sole assignment of error is sustained.

{¶ 53} For the foregoing reasons, the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

BOGGINS, P.J., and GWIN, J., concur.
Ohio App. 5 Dist.,2005.
State v. Siler
164 Ohio App.3d 680, 843 N.E.2d 863, 2005 -Ohio-6591

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AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being

twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion,

shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
FILED
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No. 07-960

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

STATE OF OHIO,

Petitioner,

v.

BRIAN K. SILER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 1354 (2004), this Court held that the prosecution's presentation of testimonial hearsay from an unavailable declarant violated a criminal defendant's Confrontation-Clause rights. Two years later, construing *Crawford*, this Court held that when police questioning is concerned primarily with eliciting facts about past events, statements obtained pursuant to such questioning must be deemed testimonial, and thus cannot be used by the state in criminal prosecutions. *Davis v. Washington*, 547 U.S. 813 (2006).

Given that the declarant herein was subjected to over ninety minutes of questioning by a homicide detective, the question in this case is whether the Ohio Supreme Court correctly applied *Crawford* and *Davis* when it held that testimonial hearsay statements of the lone potential eyewitness should not have been presented to the jury.

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BRIEF IN OPPOSITION

Pursuant to a remand from this Court on the basis of *Crawford v. Washington*, both the Ohio Court of Appeals and the Ohio Supreme Court determined that Respondent Brian K. Siler's Confrontation-Clause rights were violated at trial. The state courts reached this conclusion through reliance on the holdings in *Crawford* and in *Davis v. Washington*. Reliance on *Davis*, in particular, was appropriate, because the scenario there is the same as that presented herein: a state's witness is interrogated by a police officer, which officer later recounts to the jury the testimonial hearsay statements of an eyewitness or purported eyewitness. As the Ohio Supreme Court has correctly applied two very recent and unequivocal holdings issued by this Court to a factual scenario that is not distinguishable from that presented in *Davis* in any meaningful way, it is difficult to fathom why this petition is before the Court.

OPINIONS BELOW

On December 6, 2004, this Court granted Mr. Siler's Petition for Writ of Certiorari to the Ashland County, Ohio, Court of Appeals, which vacated the appellate court's prior judgment, and remanded for further consideration in light of *Crawford v. Washington*. *Siler v. Ohio*, 543 U.S. 1019, 125 S.Ct. 671 (2004). The subsequent decision of the Ohio Supreme Court appears at A-1 of the Appendix to the Petition for Writ of Certiorari. The decision of the Ohio Court of Appeals appears at B-1 of the Appendix to the Petition.

JURISDICTIONAL STATEMENT

The Ohio Supreme Court issued its decision on October 25, 2007. Petitioner appears to have timely filed its petition.

The State of Ohio has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which provide in pertinent part:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the spring of 2001, marital tensions arose between Brian Siler and Barbara Siler. The couple had married in 1988, and had their only child, Nathan, in 1998. After a two-week separation, the couple separated permanently at the end of July 2001, immediately following a domestic dispute that initially resulted in no charges against either Mr. or Mrs. Siler. Mr. Siler went to live at his brother and sister-in-law's house, while Mrs. Siler remained in the marital residence with their son, Nathan.

On September 20, 2001, Mrs. Siler's body was found hanging in her garage. The house showed signs of forced entry. Nathan was present at the house, sleeping in his bed, when the body was discovered at approximately 2 p.m. Mr. Siler was interviewed by sheriff's deputies that same day, having initially waived his Miranda rights. He stated that he had no knowledge

of, or involvement in, Mrs. Siler's death. He recounted that he had spent the prior evening with his brother finishing some drywall, went to bed, saw his sister-in-law in the middle of the night after he used the bathroom, and arose early the next morning for a job interview in Columbus, which he arrived at no later than 9:20. Accordingly, Mr. Siler filed a notice of alibi at trial.

Twenty minutes after Deputy Singleton arrived and found Mrs. Siler, Ashland County Sheriff's Detective Larry Martin arrived at the scene. Detective Martin first spoke to Nathan Siler at around 2:20 p.m. on September 20, 2001, more than eight hours after the latest possible time of death established by the coroner. By that time, Deputy Singleton and Captain Richert had secured the scene and ensured the safety of people present. Already several law enforcement personnel were on site conducting the investigation and taking photographs. Upon Detective Martin's arrival, he was briefed by Captain Richert. Detective Martin then viewed and photographed the scene, and started questioning Nathan approximately 20 minutes after he arrived at the scene. Detective Martin's primary function when questioning Nathan was to investigate, not to secure the scene.

Sheriff's Deputy Ron Singleton had already attempted to talk to Nathan without success. Nathan also initially did not want to talk to Detective Martin. According to Detective Martin, Nathan did not appear to be in any distress, was not excited, did not appear to be nervous, and was not upset. Detective Martin agreed that Nathan appeared "at ease." Detective Martin initially questioned Nathan for 30-45 minutes. After questions about Nathan's interests and his going to the fair the night before, Detective Martin asked him if "after he got home, did anything scare him," "how daddy scared him," and "did anything else scare him."

After 30 to 45 minutes of questioning, a family friend took Nathan from the scene and bought lunch for him. When Nathan returned, Detective Martin resumed questioning for another

hour while Nathan intermittently played with other children. Detective Martin repeated the questions about what had scared Nathan after the fair. He then asked "where they were fighting at, who was hurting mommy." Detective Martin next handed a teddy bear to Nathan and asked him if he could show Detective Martin "by using the teddy bear how daddy was hurting mommy," which Nathan did not do. Then Detective Martin began holding a children's services investigator in "different positions, grabbing her wrist, her arms, bear hug," to demonstrate how Mr. Siler might have hurt Mrs. Siler. After demonstrating numerous positions, Detective Martin put his arm around the investigator's neck, and asked Nathan "like that?" Nathan was said to have responded yes and to have begun to cry. Finally, Detective Martin asked Nathan "who put the yellow thing around mommy?" Nathan is said to have responded that it was his father.

Defense counsel objected to Detective Martin's testimony about Nathan's responses to the questioning. This objection renewed the standing objection made during the testimony of Deputy Singleton concerning Nathan's statements. The court overruled the renewed objection, explicitly relying on its earlier ruling that Nathan's statements were excited utterances. At the conclusion of Detective Martin's testimony, defense counsel moved for a mistrial, citing the prejudice resulting from the erroneous admission of Nathan's hearsay statements. The court summarily overruled the motion.

The State's forensic pathologist testified as to cause of death, opining that Mrs. Siler died of cervical compression, inconsistent with hanging. Dr. John Pless, a former county coroner and a professor of pathology at Indiana University's medical school, testified that Mrs. Siler had hung herself. In his direct appeal, Mr. Siler raised numerous assignments of error. His first assignment of error claimed that the trial court's admission of Detective Martin's recollections of Nathan Siler's statements made in response to his extended questioning violated the

Confrontation Clause of the United States Constitution. Mr. Siler argued the statements were not excited utterances, nor were they admissible pursuant to *Ohio v. Roberts*, 448 U.S. 56 (1980). The Court of Appeals overruled the first assignment of error, concluding that the statements were excited utterances and properly admitted. *State v. Siler I*, Ashland App. No. 02-COA-028, 2003-Ohio-5749.

Mr. Siler filed a timely notice of appeal and memorandum in support of jurisdiction in the Ohio Supreme Court. He again raised the claim that admission of Nathan's statements to police violated his rights under the Confrontation Clause. The Ohio Supreme Court denied review of Mr. Siler's case without opinion on March 24, 2004. *State v. Siler*, Ohio Supreme Court Case No. 2003-2106, reported at 101 Ohio St. 3d 1489, 2004-Ohio-1293.

Following a timely, unsuccessful request for reconsideration in light of *Crawford v. Washington*, Mr. Siler filed a timely petition for writ of certiorari in the United States Supreme Court, arguing that the Court should vacate the decision and remand to the Court of Appeals for further consideration in light of the decision rendered in *Crawford*. The questions presented to this Court were as follows: 1) "Are an accused's rights under *Crawford* and the Confrontation Clause violated when state courts characterize statements that are the end result of a one and a half-hour police interview as an excited utterance?" and 2) "Under the rule set forth in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), does the Confrontation Clause allow the admission into evidence of a statement made by a purported eyewitness in response to police questioning when the eyewitness is three years old, incompetent to testify, and thus unavailable for confrontation?"

On December 6, 2004, this Court granted the petition, vacated the appellate court's prior judgment, and remanded for further consideration in light of *Crawford v. Washington*. *Siler v. Ohio*, 543 U.S. 1019, 125 S.Ct. 671 (2004).

On remand, Mr. Siler raised the following error: "The trial court erred in permitting Nathan Siler's hearsay statements to Detective Martin to be admitted as excited utterances, thereby depriving Mr. Siler of his right to confront witnesses, as guaranteed by the 6th and 14th Amendments, U.S. Const." The Ashland County Court of Appeals concluded that "Detective Martin's questioning of the child, although resulting in allowable 'excited utterances' under the Ohio Rules of Evidence, was nonetheless a structured police interrogation as envisioned in *Crawford* and therefore constituted testimonial evidence." *State v. Siler II*, 164 Ohio App. 3d 680, 2005-Ohio-6591, at ¶ 49. The appellate court found that the error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

The State of Ohio sought the review of the Ohio Supreme Court. The issue before that court was "whether a child's statements made in the course of a police interrogation to a sheriff's deputy should be considered testimonial or nontestimonial." *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, at ¶ 2. The case was briefed and argued, and the Ohio Supreme Court's decision followed and applied *Davis v. Washington*, concluding that the police interrogation did in fact produce a testimonial statement. Id., at ¶¶ 24, 43-46.

REASONS FOR DENYING THE PETITION

Because the ruling of the Ohio Supreme Court does not contravene the Confrontation Clause, and because it follows and correctly applies this Court's recent precedents, the petition should be denied. Nothing in *Crawford* or *Davis* suggests that this Court intended to create—or encourage the state courts to create- new, slippery-slope categories of exceptions that would erode or swallow the recently restored Confrontation-Clause rights that are guaranteed by the Sixth Amendment. Yet that is precisely what the State of Ohio seeks here, by suggesting that

somehow statements of young declarants should be treated differently from those of every other declarant.

Less than two years ago, this Court created a boundary between police questioning that results in testimonial statements and that which produces nontestimonial statements. *Davis v. Washington* (2006), 547 U.S. 813, 126 S. Ct. 2266. A statement made in response to police questioning is "testimonial when the circumstances objectively indicate there is no [ ] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to the criminal prosecution." *Davis*, 126 S.Ct at 2273-74. Police interrogation "solely directed at establishing facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" fall squarely within the class of testimonial hearsay subject to the Confrontation Clause. *Davis*, 126 S.Ct. at 2276.

The petition proclaims that "[t]he instant case is similar to *White v. Illinois*, 502 U.S. 346 (1992)" a case involving spontaneous declarations of a child to a multitude of individuals, including a police officer. Given that over 90 minutes of police interrogation occurred in this case, there is, in fact, no similarity whatsoever between this case and *White*.

As was concluded by the Ohio Supreme Court, the purpose of Detective Martin in interviewing Nathan Siler was to obtain information about the death of Barbara Siler. Hence, the reenactment of various violent scenarios for Nathan's benefit, the extended nature of the questioning, and the repeated covering of the same investigational ground. As such, any statements obtained from Nathan were testimonial. Presenting the statements to the jury in the words of the law enforcement officer, without any opportunity to examine the declarant about the statements, violated Mr. Siler's Confrontation Clause Rights.

Neither *Crawford* nor *Davis* even suggests that the age of the declarant would be relevant to determining whether testimonial statement were provided to an interrogating officer. In fact, an opportunity to leave that door open was presented during the *Davis* opinion's brief discussion of *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), wherein a youthful crime victim's statements to her mother were at issue. Rather than inserting a simple footnote that could have observed that *Brasier*'s youthful declarant's statements might be subjected to a different analysis than those of the adult declarant in *Davis*, the opinion of the Court did not even address the issue. Given that this Court is well aware that unavailability to testify is often the result of the age of the declarant, the lack of any signal whatsoever that the age of the declarant may be relevant cannot be deemed a mere oversight, or an indication that the issue is rare or obscure.

There are at least two reasons why it is unsurprising that there was no suggestion of a possible later focus of this Court on the age of the declarant. First and foremost is the fact that there is absolutely no common-law antecedent for the proposition that a criminal defendant should lose his right to confront witnesses against him merely because the accuser is below a certain age. At the time of the drafting and adoption of the Bill of Rights, the position put forth here by the State of Ohio was applied in no court of law, or even contemplated as a possible exception to the right to confront one's accusers.

Discussion of the second reason—if another is even needed—requires that we first assume, *arguendo*, that through torturous gymnastics of law and reason[1] the conclusion could be reached that children's accusatory statements are "non-testimonial," thus their use in court without the opportunity for cross-examination would be permitted under the Sixth Amendment.

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[1] The gist of such gymnastics would be that children's statements are not testimonial because they do not know what they are doing or saying. Which, of course, begs the question: if they do not know what they are doing or saying, why is it appropriate to use their words—in an unchallengeable manner—as the basis for criminal convictions that can result in execution or, as here, a lifetime of imprisonment?

As a practical matter, under this theoretical scenario, it would be impossible to create a meaningful divide between children whose statements must be deemed testimonial and children whose statements must be deemed non-testimonial. Further, by logical extension there would also have to be a similar treatment for government witnesses of limited mental abilities, who would also be unable to comprehend that they were offering statements that might be later used in court in a criminal proceeding. Thus, following the State of Ohio's logic, there would also have to be created a dividing line based on the I.Q. of the declarant, as certainly declarants of low I.Q. are no more able to comprehend the workings of the justice system than are children. It does not require extended analysis or argument to establish that the state's desired approach to the testimonial hearsay statements of children, in addition to violating the Sixth Amendment, would result in insurmountable problems in application.

CONCLUSION

The Supreme Court of Ohio correctly followed this Court's recent Confrontation Clause precedents, thus there is no question presented that warrants the Court's attention. Further, the State of Ohio lacks either historical or logical support for its notion that the testimonial hearsay statements of a government witness can be admitted without violating the Confrontation Clause of the Sixth Amendment. The petition should be denied.

Respectfully submitted,

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No. 07-960

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

STATE OF OHIO,

Petitioner,

v.

BRIAN K. SILER,

Respondent.

CERTIFICATE OF SERVICE

I, Jill E. Stone, a member of the Bar of this Court, hereby certify that on this 22nd day of February, 2008, a copy of the foregoing BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and AFFIDAVIT OF INDIGENCY were sent by first class U.S. Mail, pursuant to Rule 29.3, to Ramona F. Rogers, Ashland County Prosecutor, 307 Orange Street, Ashland, Ohio 44805. I further certify that all parties required to be served have been served.

Jill E. Stone

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MOTION FILED
FEB 21 2008
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No. 07-960

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

BRIAN K. SILER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the National District Attorneys Association respectfully requests leave to file the accompanying brief as amicus curiae in support of petition for writ of certiorari in the matter of *State of Ohio vs. Brian K. Siler*. Petitioner State of Ohio has consented to the filing of this brief, but Respondent, Brian K. Siler, through his Attorney Jill E. Stone has withheld consent, necessitating this motion.

As described in the statement of interest in the attached proposed amicus curiae brief, the National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States. The Association presently has approximately 6,500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim witness advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

As amicus curiae, the National District Attorneys Association is uniquely positioned to witness the impact that the recent United States Supreme Court decision in *Crawford* and *Davis* have had on the admissibility of children's statements. The National District Attorneys Association conducts national trainings on the impact of the *Crawford* decision and answers a multitude of

technical assistance questions from prosecutors about the impact the *Crawford* and *Davis* decisions have had on the admissibility of statements of a child victim or child witness. As a result it has become apparent to the National District Attorneys Association, due to the present legal uncertainty in Ohio and nationally of statements of child victims and witnesses, that prosecutors across this country are eager for a resolution of the precise analysis to be utilized to determine the legal status of children's statements.

In addition, the National District Attorneys Association is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child in the present case in an effort to urge this Honorable Court to adopt a "reasonable child" standard.

For these reasons, the National District Attorneys Association respectfully requests that its motion for leave to file the accompanying brief as amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States.[1] The association presently has approximately 6,500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people. In doing so, the National District Attorneys Association provides professional guidance and support to its members, serves as an education and resource center, follows public policy issues involving criminal justice and law enforcement and produces a number of publications. As amicus curiae, the National District Attorneys Association is exceptionally positioned to witness the impact that the recent United States Supreme Court decisions in *Crawford* and *Davis* have had on the admissibility of children's statements in criminal prosecutions.

The American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, a division of the National District Attorneys

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[1] Counsel of Record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Association, has received a multitude of technical assistance questions and training requests from prosecutors on the admissibility of child victim and witness statements since the decision in *Crawford v. Washington*, 541 U.S. 36 (2004). To respond to such requests, the National District Attorneys Association provides both nationwide trainings as well as staff designated to answer *Crawford* related technical assistance questions. Since the *Crawford* decision was announced in 2004, the National Center for Prosecution of Child Abuse has conducted approximately 58 trainings concerning the impact of the *Crawford* decision on prosecutions involving child statements in 26 states and the United States Territory of Guam, reaching approximately 8,000 prosecutors, law enforcement and allied professionals. In addition, the National Center for Prosecution of Child Abuse has produced an outline of post-*Crawford* cases that now has blossomed to approximately 400 pages with over 140 subsections. Approximately 1,000 state and federal prosecutors have registered to utilize this outline and have received a username and password. In the last nine months of 2007, the National District Attorneys Association website received over 1,000 hits and downloads of the *Crawford* outline that was developed to assist front-line prosecutors. It is not unusual, as prosecutors attend a *Crawford* training sponsored by the National District Attorneys Association or contact the association with technical assistance questions, to ponder whether per *Crawford* and *Davis*, a child's statements are to be analyzed like those of an adults. Furthermore, prosecutors are seeking guidance on the issue of whether or not their established child abuse

investigation and prosecution protocols warrant modification per the *Crawford* and *Davis* rulings. A major query from prosecutors nationally is the role that law enforcement may now play in the multidisciplinary forensic interview of a child victim or child witness in light of the *Crawford* and *Davis* rulings. Since lower Courts are divided on admissibility of child statements, amicus curiae urges this Honorable Court to clarify the analysis necessary to determine the testimonial nature of a statement of a child victim or witness. It is apparent to amicus curiae that prosecutors across this country are eager to obtain a workable legal analysis of the admissibility of various forms of children's out of court statements.

Due to the present legal uncertainty in Ohio and nationally of the admissible statements of children, the National District Attorneys Association urges this Honorable Court to grant Writ of Certiorari to Petitioner State of Ohio and to adopt a reasonable child standard for children's statements. To further this request, amicus curiae is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child witness in this case. Since the United States Supreme Court has yet to examine a child witness case in light of the *Crawford* and *Davis* rulings, amicus curiae has a public interest in supporting the Petitioner's request for Writ of Certiorari and the Petitioner's position that the decision by the Supreme Court of Ohio be reversed and the statements of the minor child be allowed into evidence.

SUMMARY OF ARGUMENT

The Supreme Court of Ohio erred in ruling that statements made by a three year-old child witness were "testimonial statements" within the meaning of *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S. Ct. 1354 (2004) and, therefore, inadmissible at trial. Lower courts are divided nationally on the precise standard to be utilized in analyzing statements of child victims and witnesses. For these reasons, the United States Supreme Court should grant State of Ohio's petition for Writ of Certiorari and adopt a reasonable child standard in determining the testimonial nature of children's statements.

ARGUMENT

I. A three-year old child cannot reasonably expect or anticipate that statements he made to a law enforcement officer would later be used prosecutorially, therefore, this Honorable Court should adopt a "reasonable child" standard when evaluating children's statements pursuant to *Crawford*.

Since the United States Supreme Court has yet to review a case post-*Crawford* on the issue of the admissibility of children's statements, prosecutors and judges are left with conflicting standards for determining whether or not these statements are testimonial.

In the instant case, the Ohio Supreme Court, utilizing a "primary purpose" analysis as enunciated in *Davis v. Washington*, 543 U.S. ____, 126 S.Ct. 2266 (2006), ruled that since law enforcement conducted the questioning of the three year old child, that the statements of the child were testimonial and violated the defendant's right of confrontation afforded by the Sixth Amendment of the United States Constitution. In essence, the ruling of the Ohio Supreme Court completely disregarded the cognitive capacity of the child to objectively expect that his statements would later be used prosecutorially per a *Crawford* analysis.

The ruling of the Ohio Supreme Court is in sharp contrast to a recent 4th Circuit United States Court of Appeals decision which held that the statements of a declarant were non-testimonial by utilizing the state of mind of the declarant in the Court's analysis, *See U.S. v. Udeozor,* 2008 WL 271295 (4th Cir. 2008). In *Udeozor,* the Court stated that "the intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would expect that his statements would be used prosecutorially". *Id. at* 23. *See State v. Slater*, 2008 Conn. LEXIS 8. Amicus curiae asserts that the time has come for this Honorable Court to clarify the tension between the *Crawford* objective person analysis and the *Davis* primary purpose analysis.

It is the contention of amicus curiae that there are many additional courts throughout the country,

unlike the Ohio Supreme Court, that have properly sought to examine the state of mind of the child declarant in evaluating whether a statement is testimonial. The Minnesota Court of Appeals in *State v. Scacchetti*, 690 N.W.2d 393 (2005) held that a three year old child victim's videotaped statements to a nurse were non-testimonial. The Court in *Scacchetti* emphasized the importance of the child victim's cognitive awareness of the consequences of their statements at the time they are being made. The Court stated that "in order for *Scacchetti* to succeed on this argument he must show, under *Crawford*, that the circumstances surrounding the contested statements led the three year old to reasonably believe her disclosures would be available at a later trial, or that circumstances would lead a reasonable child of her age to have that expectation. See *Crawford*, 124 S.Ct. at 1364, *Scacchetti's* arguments fail to show this". *Id at* 396. In another case involving a three year old child abuse victim, State *v. Bobadilla*, 709 N.W. 2d 243, (2006), the Minnesota Court declared that a three-year-old child could not understand the legal processes and consequences of his statements made during a forensic interview.

In a recent Texas Appeals Court child abuse case, *Lollis v. State*, 232 S.W.3d 803 (Tex. Ct. App. Texarkana - Aug. 10, 2007), the Court indicated that "there is no evidence that, from the perspective of the children, the ongoing relationship with Clark was anything but counseling. And that is the proper perspective from which we view the context of the statements". *Id. at* 12. In addition, in the Minnesota case of *State v. Krasky*, 736 N.W. 2d 636 (Minn. 2007), the Court indicated that "In both *Bobadilla*

and *Scacchetti* we noted that it was unlikely that the child complainant knew that the statements could be used at trial against an abuser". *Id. at* 642.

In the Kansas case of *State v. Henderson*, 160 P. 3d 776 (2007) the Court declared that "a young victim's awareness, or lack thereof, that her statements would be used to prosecute, is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis* guidance after *Crawford*." *Id. at* 785. The Illinois Court has also spoken to the age of the child in their testimonial analysis in the child abuse case of *People v. Stechly*, 225, Ill. 2d 246, 870 N.E. 2d 333, (Ill. 2007). *Stechly* stated

> In accordance with the weight of authority, as well as Professor Friedman's analysis, we believe that the better view is to treat a child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statements would be available for use at later trial. *Id. at* 296.

Clearly, the state of mind of the child declarant at the time the statements are being made is essential to the Court's analysis.

A line of cases involving a child's statements to a medical professional have indicated the importance of analyzing these cases from the perspective of the child. See *State v. Johnson,* 2006 Ohio 5195 (nine year old's statement to medical professional non-testimonial); *McDonald v. State*, 2006 Tex App. LEXIS 7416 (two year old's statement to a medical

professional non-testimonial). The Massachusetts case of *Commonwealth v. DeOliveira*, 447 Mass. 56 (2006) further developed the importance of focusing on the age of the child in the testimonial analysis. The *DeOliveira* Court declared that in the case of a six-year-old's statement to a doctor "a reasonable person, armed with her knowledge could not have anticipated her statements would be used prosecutorially." *Id. at* 56 In the Colorado case of *People v. Vigil*, 127 P.3d 916 (Colo. 2006) the Court declared that a seven-year-old child's statement to a physician should be analyzed using "an objective reasonable person standard." *Id. at* 923.

The three year old witness in this case could not possibly have known that his statements to law enforcement would be used against his father for the murder of his mother in a criminal prosecution. It is consistent with *Crawford* that a reasonable child standard be adopted in determining whether child victims and witnesses statements are testimonial.

II. Child development research studies demonstrate that young children do not understand judicial players and processes and, therefore, supports the adoption of a "reasonable child" standard.[2]

Research has shown that young children do not understand what court

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[2] Argument II- child development studies and discussion reproduced from American Prosecutors Research Institute's amicus curiae brief filed with the Supreme Court of Ohio in the matter of *State of Ohio v. Brian K. Siler*, No. 2006-0185. Argument II reproduced with permission from author Alice Anna Phillips, former Senior Attorney, American Prosecutors Research Institute.

> is and, therefore, are unable to understand that statements made, even to a police officer, could be used in that forum.
>
> Testifying is anxiety-producing for most adult witnesses. Adults, however, are sufficiently knowledgeable about the legal system to place their testimony in context. Adults understand-at least in general terms-what happens in court and what is expected of them. This knowledge helps adults manage the stress of testifying. By contrast, many children have little idea of what to expect in court. Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them.

Symposium, Child Abuse: *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 23 Pacific Law Journal 3 (1996).

Below are six of the leading studies evaluating what children understand about court and when they understand certain court-related concepts.

1989 Saywitz Study: "*Children's Conceptions of the Legal System*"

Dr. Karen Saywitz published a study in 1989 that focused on developmental differences in children's understanding of the legal system and what contributes to that understanding. Karen Saywitz, *Children's Conceptions of the Legal System: Court is a Place to Play Basketball,*

Perspectives on Children's Testimony, 131-157 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). Forty-eight children (ages four to fourteen) were divided into age groups. Half of the children were actively involved in court cases. The study focused on eight court-related concepts: "court," "jury," "judge," "witness," "lawyer," "bailiff," "court clerk," and "court reporter." All the children were asked questions and shown illustrations of these eight concepts and asked to tell what they knew about the concept. The terms "bailiff," "court clerk" and "court reporter" were removed from the final results as the children in all age groups did not understand those concepts. Surprisingly, children with more actual court experience demonstrated less accurate and less complete knowledge than children with no court experience. The researchers surmised this could be for two reasons. First, children who were involved in court cases may have emotional difficulties that interfere with cognitive abilities because they were from dysfunctional families; and second, actual court experience for children may be confusing and chaotic, thus making accurate knowledge of the system more difficult. The chart below demonstrates the percentage of children in each age group that showed accurate understanding of each of the eight concepts:

Concept	Age Group 4-7 Years	Age Group 8-11 Years	Age Group 12-14 Years
Court	0.06% accurate	74% accurate	100% accurate
Jury	0% accurate	21% accurate	73% accurate
Judge	0.06%	93%	91%

	accurate	accurate	accurate
Witness	0.11% accurate	86% accurate	100% accurate
Lawyer	0% accurate	93% accurate	100% accurate
Bailiff	0.06% accurate	0% accurate	0.09% accurate
Court Clerk	0% accurate	0% accurate	0.18% accurate
Court Reporter	0% accurate	50% accurate	64% accurate

Children that are the age of the child in this matter have little or no understanding of the court system's players much less the actual processes contemplated at the time of the interview. Therefore, under the formulation set forth in *Crawford*, a child of this age could not reasonable expect that statement made to a law enforcement officer could later be used prosecutorially. Children between the ages of eight and eleven begin to have a more accurate understanding of the court system and the primary people involved (jury, judge, witness and lawyer), yet are still confused by details and duties.

Additional concepts were tested in this study that further demonstrate when children understand court-related concepts. First, all children were asked: "What makes a jury/judge believe a witness?" The children in the older age group were able to identify factors used by judges and juries to determine credibility of witnesses, whereas the four to seven-year-old group assumed witnesses always tell the truth and are believed. Whether the children were in the experienced or non-experienced

court group did not affect this result. Second, all children were asked: "How do they [judge/jury] decide who wins the case in court?" The majority of eight to fourteen-year-olds were inaccurate in their overall understanding. They generally believed that judge and jury decision-making are dependent on each other. Some children in this age group believed that the judge and jury discuss the case together and that the judge can change the jury's verdict. Only three children (in the twelve to fourteen age group) understood that the judge and jury were independent from each other. Third, all children were asked the following questions: "What happens when people tell the truth in court? What happens when people tell a lie in court? Why is it important that people tell the truth in court?" Here, awareness was significantly different across age groups, but not across levels of court experience. A majority of the four to seven-year-olds could not demonstrate any awareness of the court processes of gathering and determining the truth of evidence. Many of these children believed that the court's goal was to "punish the criminal or give the child to one of his parents," rather than understanding the actual goals of collecting, presenting, and evaluating evidence. Further, these children held the naïve view that evidence would magically present itself and be automatically believed. This study demonstrates that the child in this matter could not reasonably understand or expect that his statements might later be used in a court proceeding.

Overall, this study demonstrated the following for each age group:

(1) Four to Seven Years Olds: As a result of their egocentric view of the world, this group of children understood some features of the legal system, but not any definable features. For instance, some children understood that a judge is there to talk and listen, but did not understand that a judge is in charge of the courtroom or determines a sentence. This group was unable to meet the criteria of accuracy for any of the concepts listed above. These children could describe court-related personnel as sitting, talking, and helping but could not say how these people perform their roles nor differentiate between these varied roles. For example, the children interchanged the roles of court, police, and prison and were confused as to whether judges remain judges when they go home at night. This group also understood that witnesses had to tell the truth, but only thought that witnesses did so to avoid being punished. Additionally, these children believed that all evidence was necessarily true. The children had blind faith that witnesses tell the truth and, if witnesses themselves, would be surprised by a confrontational cross-examination or repeated interviews which are not consistent with that blind faith. These children further believed that the court process ultimately led to jail and the children could only describe court from the point of view of someone who was in trouble. When applying the results of this study to the child in the present case, this court can objectively determine that the child did not have the cognitive development to

know that his statements could be used in court.

(2) Eight to Eleven Year Olds: Children of this group were able to view court as a place to work out disagreements, but still struggled with defining features between juries and judges. However, these children were better able to understand that judges determine guilt or innocence and decide punishment. They also viewed court similar to church ("You have to be quiet and serious"), and that lawyers help people, are on your side (which shows some understanding of the adversarial process), and stand up for you in court (which shows representational awareness). This group of children showed increased understanding of the differing roles of court-related people, the court process and its function. These children were less likely to confuse the roles of the court and the police. Under the age of ten, children do not understand what a jury does and they still confuse the word with similar sounding words. Between ages eight and eleven, the children studied did not understand that impartial people sit as jurors and instead believed that victims, witnesses, and defendant's friends are on the jury. This group did not understand that the jury decides the outcome of the case.

(3) Twelve to Fourteen Year Olds: This group was able to understand the court process and place it in context with the overall government. At this age, these children became aware of the function of juries, but are still confused about

> the role of the jury in making decisions. Some children believe that the judge and jury work together to make a decision. This demonstrates that children do not understand the need to communicate to the jury rather than the judge. The children in this group could understand factors that would be considered when determining credibility (such as facial expressions, reputation, personality, comparison with corroborating evidence, etc.).

Based on this study, the child in this matter should not be held to an adult level of cognition that developmentally they are not able to attain. Thus, adopting a "reasonable child" standard in accordance with the research is appropriate when addressing the formulations set forth in *Crawford.*

1990 Saywitz Study: "*Children's Knowledge of Legal Terminology*"

Dr. Saywitz conducted another study, published in 1990, that analyzed whether age and grade-related patterns would be found when testing children on commonly used court terms. Karen Saywitz, Carol Jaenicke & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 L. & Hum. Behav. 523 (1990). Sixty children were grouped according to school grades, given a list of 35 legal terms and asked to tell everything they knew about each word. The study showed that some legal terms had significant grade-related trends. Some terms, which were accurately defined by the sixth graders, were largely inaccurate for the kindergartners, such as: "oath," "deny," "lawyer," "date," "sworn," "case," "jury," "witness," "judge," "attorney," "testify," and

"evidence." On the other hand, some legal terms did not have grade-related trends because children in all three groups equally understood or misunderstood the term. Terms that were easy for all groups of children to describe accurately were: "lie," "police," "remember," "truth," "promise," and "seated." Terms that were difficult for all groups of children to describe accurately were: "charges," "defendant," "minor," "motion," "competence," "petition," "allegation," "hearing," and "strike."

The study also considered if the age of the children contributed to whether an unfamiliar word was mistaken for a similar sounding word (i.e., jury was mistaken for jewelry) or whether a word had another meaning outside the court system (i.e., "motion is like waving your arms"). These two types of errors were found to be grade-related insofar as the sixth graders made significantly fewer of these errors than the third graders or kindergartners. For example, 19 of 20 kindergartners and 18 of 20 third graders erred with the word "hearing," whereas only 7 of 20 sixth graders made the same error. This demonstrated that the older children were able to understand that familiar words may have a different meaning in the court system.

This study demonstrated that "a majority of legal terms tested were not accurately defined until the age of 10." *Id. at* 531. Of interest is that younger children admitted lack of knowledge or unfamiliarity with a legal term more frequently than older children. Thus, older children may answer a question concerning a court term; yet not understand the term or the question. On the other hand, younger children may think that they

understand the meaning of the term and may testify accordingly, when in fact they have a different meaning in their mind than the adult does. The study found that younger children (under eight years of age):

> fail to realize that they have insufficient information to correctly interpret the world. At times, they fail to identify and monitor their own limitations as communicators. The younger children's resistance to the prompt, "Could it mean anything else in a court of law?" suggests that they had limited metacognitive ability to foresee that a term would mean something else in a different, potentially unfamiliar, context. Moreover, it may be difficult for them to shift from one context to another or to continue to generate alternate solutions.

Id. at 532. However, by third grade, children may be able to fit familiar terms into a different context, such as a court setting.

This particular study demonstrates that even if a child within the age-frame of this study is informed during an interview that their statements may be used in a court proceeding, this does not necessarily mean that the child understands what court is or what the purpose of court is. On the other hand, if such information is not provided to a child during an interview, it is not fair to expect the child intuitively to understand the function of court or that the interview may be used in a criminal prosecution. In this case, the child was not informed that his statements might later be used in court, and no court-related subjects were discussed.

1989 Warren-Leubecker Study: "*What Do Children Know about the Legal System and When Do They Know It?*"

A study conducted in Australia, published in 1989, researched the developmental trends in children's perceptions of the legal system, court-related personnel, reasons for going to court, and how decisions are made. Amye Warren-Leubecker, Carol S. Tate, Ivora D. Hinton and Nicky Ozbek, *What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, Perspectives on Children's Testimony* 158-183 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). The study involved 563 children ranging in ages two years and nine months to fourteen years in age. The children were asked 23 questions, six of which are included below:

(1) Do you know what a courtroom is? 18% of three-year-olds, 40% of six-year-olds, 85% of seven-year-olds, and up to 100% of thirteen-year-olds answered "yes."

(2) Who is in charge of the courtroom? 82% of the three-year-olds indicated they did not know and the remaining 18% answering incorrectly (i.e., a doctor). Answering the Judge was in charge of a courtroom were 15% of four-year-olds, 25% of five-year-olds, 56% of six-year-olds, 73% of seven-year-olds, and 92% of eight-year-olds.

(3) Who else is in the courtroom (besides the judge)? The chart below demonstrates the percentage of correct answers according to age.

Age in years/Percentage Correct

	3	4	5	6	7	8	9	10	11	12	13
Jury	0	0	3	4	8	13	19	28	38	38	40
Lawyer	0	0	3	0	8	15	31	44	36	40	20
Witness	0	11	3	0	0	28	23	20	16	19	30
Police	0	11	10	26	15	36	26	17	23	34	30
Defendant	0	7	0	0	8	15	19	28	27	21	20
Plaintiff	0	0	0	0	4	8	10	15	19	17	20
Audience	9	0	0	4	4	3	2	4	7	2	20
Bailiff	0	0	0	4	4	0	4	6	9	15	0
Court Clerk/ Reporter	0	0	0	0	0	3	3	14	15	9	0

(4) What does a lawyer do? Children under the age of seven did not know what a

lawyer does. When children reached age ten they began to distinguish between attorneys who prosecute or defend others.

(5) What is the jury and what do they do? A large number of children mistook the word jury for jewelry and were unable to answer this question. In general, it was not until age ten that a significant number of children could understand that a jury is involved in decision-making. However, at age twelve, 30% of these children still did not understand the role of a jury in court.

(6) Why do people go to court? A significant number of younger children did not know or were not able to provide a reason as shown by these percentages: 91% of three-year-olds; 75% of four-year-olds; 62% of five-year-olds; 43% of six-year-olds; 27% of seven-year-olds; 15% of eight-year-olds; and not until age thirteen were all children able to provide an answer.

Of interest with this particular study is that it includes children of the same age as the child victim in the present case. The results above clearly demonstrate that a majority of children age ten and younger do not understand court-related terms, the players involved in court proceedings, the purpose of court proceedings, nor the most basic level of the purpose of court. Again, this study is consistent with the abovementioned prior studies in showing that

until approximately the age of ten years old children do not understand the court process objectively and consequently cannot understand that their out-of-court statements may be used in court.

1989 Flin Study: *"Children's Knowledge of Court Proceedings"*

A study from the United Kingdom, published in 1989, replicated the findings in the studies above. Rhona H. Flin, Yvonne Stevenson, Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 British Journal of Psychology 285-297 (1989). Ninety children ages six, eight and ten were studied in this project. Twenty legal terms, as well as questions regarding court procedures were asked to the children. Consistent with other studies, the ten-year-old children understood more legal terms than the younger children. Only four terms ("policeman," "rule," "promise," and "truth") did not show a significant difference in accuracy between the age groups. However, terms like "going to court," "evidence," "jury," "lawyer," "prosecute," "trial," and "witness" were clearly not understood by the six and eight-year-old children and only nominally by the ten-year-olds. When asked what kind of people go to court, children ages six and eight did not know or believed that only bad people went to court. However by age ten, these children understood that all types of people could be involved in court proceedings.

1997 Aldridge Study: *"Children's Understanding of Legal Terminology"*

A study of British children ages five to ten, published in 1997, focused on child witnesses'

understanding of the legal system. Michelle Aldridge, Kathryn Timmins, Joanne Wood, *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?* 6 Child Abuse Rev. 141-146 (1997). This study found that children do not begin to understand what a witness is or what a judge is/does until age ten; none of the children in the study had ever heard the word "prosecution," except for one child who said "prosecution's when you die. You get hanged or something awful like that." In defining what court is, the children studied had the following answers: one five-year-old stated "a court is a sort of jail;" one seven-year-old said that witnesses "whip people when they are naughty;" another seven-year-old said "the police think that witnesses have done something naughty;" and one seven-year-old described a judge as "someone who gets money, like at a pet show."

1998 Berti Study: *"Developing Knowledge of the Judicial System"*

Similar results as the Saywitz (1989), Warren-Leubecker (1989), and Flin (1989) studies were found in an Italian study from 1998. Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach, The Journal of Genetic Psychology* 159(2), pp. 221-236 (1998). One hundred students from Verona, Italy participated in this study. Of particular interest were the student responses to the question about what court is: 75% of first graders (mean age 6.7) did not know; 45% of third graders (mean age 8.6) did not know; 15% of fifth graders (mean age 10.7) did not know; and 5% of eighth graders (mean age

13.8) did not know. In response to describing a public prosecutor, all first and third graders either did not know or had never heard of a prosecutor and only 1 of 20 fifth graders and 4 of 20 eighth graders accurately described a prosecutor. The younger children similarly had difficulty understanding or describing a judge, witness, lawyer, or jury. Of interest in this study is that none of the first and third graders understood that a judge must study law to be a judge, whereas 18% of fifth graders and 94% of eighth graders understood this concept. Therefore, young child witnesses or victims may not understand the role of a judge when testifying.

Overall, results of these six research studies are similar; each indicates that children under the age ten and under do not comprehend legal terms, the nature or process of court proceedings, or the individuals involved in court proceedings. As such, how could a three-year-old conclude that his statements made during an interview would later be introduced in a court proceeding. He could not.

When determining whether a young child under the age of ten understands that statements made during any interview may subsequently be used in court, these studies demonstrate that an objective person (i.e., adult) standard cannot be applied to young children, especially children as young as the child victim in this matter. Instead, the above research amply supports the creation of a "reasonable child" standard in determining whether out-of-court statements by children are testimonial in light of the *Crawford* decision.

In this particular case, the three-year-old child could not cognitively or developmentally understand that statements made to a detective would be used in court in lieu of his live testimony. Although the interviewer was a governmental agent, this Honorable Court must also take the next step, as required by *Crawford*, and address whether an objective person in the declarant's position as a child reasonably understood that the statements made to the interviewer would later be used prosecutorially. In this case, and with children age ten and under, the answer is clearly no. This factor cannot be satisfied since children of this tender age cannot cognitively or developmentally understand legal concepts or terminology.

The studies above demonstrate that children at this developmental infancy are only beginning to obtain characteristic understanding of the legal system and do not advance to an understanding of the defining features until they are older. Moreover, according to the Saywitz studies, the shift from a child's understanding of characteristic features (i.e. a judge is an older person in a black robe) to defining features (i.e. a judge is the person in charge of procedures and enforcing the rules of the court) occurs at varying points in time for different legal concepts. There is not a set age at which every child will understand the defining features of a single concept, nor is there a set age at which one child will understand the defining features of all concepts. As a result, the formulation in *Crawford* that an objective declarant must reasonably expect his statement to be used prosecutorially in order for it to be deemed testimonial fails in this particular

matter. Accordingly, the statements of the child to the law enforcement officer should be non-testimonial under *Crawford* and should be admissible at trial.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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